The Organization of a Britannic Partnership

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"Dès qu'on écrit une constitution, elle est morte."

DE MAISTRE

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Preface

THIS essay is an attempt to state the forces which are making necessary a reorganization of the machinery for regulating the relations between the United Kingdom and the Dominions, and to suggest the outline of such constitutional modifications and developments as appear to me to meet best the needs which have arisen.

The present position is not due to the war. It would sooner or later have been reached in any case. Nevertheless the war has had an important effect on the problem, for it has accelerated the development of the Empire to such an extent that constitutional events of real importance are now matters of frequent, though often of unnoticed, occurrence. Under such circumstances, I make no claim to have recorded every relevant fact; my aim has been merely to sketch in broad outline the main tendencies which will govern future developments, and if I have succeeded in doing that I shall be well content.

The important question raised by the refusal of the United States to recognize at the Washington Conference the new international status of the Dominions arose when this work was in the press, and the high cost of printing prohibited the insertion, at that stage, of so much new material as a discussion of the problems involved would have demanded. Likewise the publication of Professor A. B. Keith's *War Government of the British Dominions* occurred too late for anything more than a passing reference to that authoritative work.

I have to acknowledge my indebtedness to Professor Tout, for valuable advice and encouragement; to Mr. Ramsay Muir, for reading the work in manuscript and preserving me from several errors in the historical chapters; to Professor Brierly, for reading the proof-sheets and for much helpful criticism; and to Miss Edith Hesling, for much assistance in the preparation of the index. It is almost superfluous to add that I alone am responsible for the opinions expressed, and for any errors that may be discovered in the work.

That portion of the book which deals with the rigidity of federal constitutions, and the section containing the discussion of the constitutional problem in India, have appeared in the *Law Quarterly Review*, and I have to thank the editor and publishers of that magazine for their readily-accorded permission to reproduce them.

R. A. EASTWOOD

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Introduction

THE person who proceeds to study the constitutional relations existing between the United Kingdom and the component parts of that which, for want of another name, people are still content inaccurately to style the British Empire discovers at the outset of his inquiry a condition of affairs not to be found in the annals of any other empire, ancient or modern; for the great outstanding characteristic of the British Empire is the amazing diversity which exists between its component parts.

Anyone who takes up a standard text-book dealing with our Constitutional Law and examines the topics there discussed under the heading of "The Dominions and Dependencies of the Crown" finds examples of every type and variety of government known to the world. At the one extreme there are the Spheres of Influence, places which are not strictly British territory at all, but in which the British Government assumes a degree of control, varying greatly in different countries, for the welfare of their inhabitants and the protection of the Europeans within their borders. To these must be added those territories which will be governed on the mandatory system introduced by Article 22 of the Peace Treaty and will add still further to the variegated character of the Empire, since several of them are to be administered, not by the Government of the United Kingdom, but by the governments of lands which, in the language of the text-books, are themselves "British Possessions." Then there is India, a vast territory occupying a peculiar constitutional position of her own and taking important steps along a newly opened path which will lead her to wide opportunities for development and welfare. Next come the Crown Colonies, some of them subject to the exclusive legislative power of the Crown, others enjoying a certain amount of representative government, having elective

or partly-elective legislative assemblies, but executive bodies which are nominated by the British authorities.

Lastly, there are the Dominions. Even among the Dominions there is no such thing as complete uniformity of government. Canada, Australia, South Africa, New Zealand, and Newfoundland have constitutions differing widely in many important particulars; but they are all alike in one essential respect—they all enjoy the outstanding characteristic of responsible government. In other words, they not only have representative legislatures but also executive governments which are dependent for their continuance in office on the support of a majority in those legislatures. This is the distinguishing feature of the government of a Dominion, which marks it out from the government of every other type of British possession and causes it to resemble, as closely as the difference between colonial and imperial affairs will allow, the government of the United Kingdom. And it may be remarked in passing that the origin of responsible government is not to be found in any statute. The statutes creating the constitutions of the self-governing Dominions contain provisions dealing chiefly with the establishment and composition of legislatures; they contain very little concerning the relations to exist between those legislatures and the executives with which they have to work. The responsible government of the Dominions was copied from the Cabinet system of the United Kingdom, and just as the Cabinet system itself has no statutory basis, but is constructed of constitutional conventions and understandings, so also the responsible government of the Dominions is a matter of convention, not statute, and arose in a purely informal manner from private instructions issued by the Colonial Office directing the governors to choose as their ministers those who could command a majority in the local legislatures.

Nevertheless, conventional though it be, it is the responsible

government of the Dominions that has produced the present problem. Spheres of Influence and Protectorates do not enter into the main outlines of its discussion ; they are all, or nearly all, inhabited by more or less barbarous populations governed by petty chieftains in accordance with distinct polities of their own, and their pertinence to the present inquiry is slight. Nor can the Crown Colonies find a place in a discussion of the main essentials of the problem. The name Crown Colony covers a miscellaneous collection of possessions. Gibraltar is a fortress and little more, and its governor is always a soldier. Other Crown Colonies are inhabited principally by semi-civilized natives—Bantus, Negroes, and other African peoples, Malays and Pacific Islanders ; and some Colonies, like Mauritius, have by colonization acquired a population to a large extent of East Indian origin. Obviously Colonies of this type do not enter largely into the solution of the present problem. Even the most advanced of the Crown Colonies has not arrived at anything like complete internal development ; its most important interests are local ; its chief problem is internal development, and its full importance as a unit in the Empire lies in the future rather than in the present.*

Nor does the case of India stand on a fundamentally different footing. India is making a vast, epoch-marking experiment in constitutional development, which ultimately must give her

* It should be noticed that there is always a tendency for a type of Crown Colony, when it has reached a certain stage of internal development, to pass from the Crown Colony system to responsible government and to complete its internal development under the latter system. The transition stage is well illustrated by the present position of Malta, which is to enjoy responsible government in local matters other than imperial property, and such interests as the Navy, Army and the Air Forces, coinage and currency, naturalization, immigration, submarine cables, territorial waters and harbours. *See* the *Malta Constitution, Letters Patent,* 1921.

an important place in the Empire, but for the present the chief Indian problem is an internal one—the problem of enabling educated Indian opinion to become articulate in the government of the country. To reduce the matter to its simplest terms, it may safely be asserted that if the Empire had consisted only of the United Kingdom and India the present Empire problem—that of reconstructing the machinery for the conduct of foreign affairs—would not yet have arisen. India would have been content for the present to go forward with schemes of internal development and to leave the control of foreign affairs in the hands of the British Government. No doubt, as matters now stand, some place for India will have to be found in any scheme of reconstruction which is adopted. Nevertheless, the present problem does not arise directly from India's needs, and for that reason the inquirer who is attempting to estimate the origin and nature of the problem is not concerned primarily with India.

His main concern is with responsible government in those parts of the Empire where it has been applied and worked, its history, its present position, and its results; and from a study of those subjects there flows an incontrovertible conclusion. It is that the British Empire has ceased to be an Empire according to any accepted meaning of that term and, so far as the mutual relations of the United Kingdom and the Dominions are concerned, has developed into a community of nations. All the disputes and struggles centring round Dominion autonomy—questions of the right of the Dominions to regulate their own economic policy, to exclude British Asiatics from Dominion territories, and so on—may have been regarded by contemporary politicians merely as unconnected incidents in the political life of the communities concerned, but time has shown them to be corner-stones in an imposing edifice of Dominion nationalism which has its foundations in Lord

Durham's famous recommendation that the doctrine of responsible government should be applied in the Colonies.

It is this Dominion nationalism which has produced the problem which the British peoples have to solve. It has impelled the Dominions to take part to the utmost limit of their respective capacities in the defence of the Empire of which they form part, and it has impelled them also, as an essential correlative, to demand and obtain a voice in the settlement on which so much of their future welfare depends. The Dominions have emerged as influential factors in the world's affairs, and the constitutional machinery of the Empire must be refashioned or developed to allow them adequate scope for the exercise of their new functions. Constitutional theory has lagged behind Dominion development, and the day has arrived when an attempt must be made to mould it in such a way as will give effect to the needs of the times and cause it to correspond with the facts as they are.

Chapter I. *Representative Government*

§ I. GREEK AND ROMAN COLONIZATION

IT has been remarked, by more writers than one, that in the Dominions the British Empire has presented to the world something wholly new. In the history of no other Empire has there been the spectacle of vigorous communities, occupying territories far larger than the area of the Mother Country herself, conducting their own particular affairs by their own machinery of government and according to their own notions of what is most fitting to their requirements, and yet remaining along with the Mother Country all parts of one greater whole.

The Greeks were a colonizing race, and one of the causes which prompted that wave of Greek colonization which began in the eighth and reached its completion in the sixth centuries before our era was, as Professor Bury tells us,* "the same spirit, not to be expressed in any commerical formula," which prompted English colonization. Yet the Greeks never founded a colonial empire. The Greek colonists took with them their original customs, language, and institutions; they maintained very close intercourse with the Mother Country; they were attached to her by strong ties of sentiment, love, memory, kinship, religion, and the like, but they were not bound to her by any political or legal tie whatever.

The reason is not far to seek. The political ideal of the Greeks, as readers of Mr. A. E. Zimmern's *Greek Commonwealth* are well aware, was the city-state. The city was to the Greeks the most perfect political unit possible, the highest form of social union. All the rights, all the duties, all the aspirations and ideals of the Greeks were bound up in the city. "They spend their bodies, as mere external tools, in the city's service, and count their minds as most truly their own when

* *History of Greece*, vol. i. p. 86.

employed on her behalf."* When the Greek emigrated he carried with him these political ideals, but, severed from his native city by a distance of many miles, perhaps by a world of waters, he was unable to fulfil what he regarded as his highest political duty and play his part in the conduct of the city's affairs. So he established another city, an exact copy of the last, and to it he performed those services which distance prevented him from rendering to his native place. It never occurred to him that it was possible for this new city to remain, in any political sense, part of the old ; for the citizens of the new city to be subjects of the old. "The Greek would have deemed himself degraded by the name of 'subject.' To him the word that best translates it expressed the position of men who, either in their own persons or in the persons of the cities to which they belonged, were shorn of the common rights of every city, of every citizen."†

Rome, again, was originally a city-state ; but her citizens were soldiers whose attention was directed to military efficiency, and who, moreover, were more plentifully endowed with energy than their neighbours. Several reasons, but more particularly a desire for natural and defensible frontiers, (which the natural configuration of their country gave to the city-states of Greece), brought the Romans into conflict with their neighbours. Their efficiency and their superior energy made them almost invariably successful. One conquest led to another ; and the conquering instinct of a military race led them on until their city of Rome became, first, the mistress of Italy and, finally, the mistress of the whole of the civilized world.

But although the Roman Empire was built up by conquest its government was not, at all events in its best days, the iron-bound military despotism that some writers have depicted it.

* *Thucydides*, i, 70.

† Freeman : *Greater Greece and Greater Britain*, p. 23.

The characteristics of the Roman Empire at its best were not rigidity and uniformity, but elasticity, adaptability, and, in consequence, diversity. The Romans retained the local systems and institutions which they found among their subject peoples, modified them to meet new circumstances, and placed their own officials over them ; but they did no more than they believed to be necessary, and, as far as possible, they left the people alone. They themselves adopted much of what they found. They conquered the Greeks and then adopted Greek philosophy, Greek literature, and Greek art. They found themselves under the necessity of providing a body of law to regulate the dealings and relations of the strangers whom the growth of the Empire brought to Rome, but they did not, as many a people so legal-minded as the Romans might easily have been induced to do, take the foolish step of creating a new legal system through the unfamiliar mazes of which their resident strangers must study a laborious way. Instead of that they appear to have built up a body of law " by taking those general principles of justice, fair dealing, and common sense which they found recognized by other peoples as well as their own, and by giving effect to those mercantile and other similar usages which they found prevailing among the strangers resident at Rome."*

And along with this diversity, as an intimate and integral part of the system, there did go an appreciable measure of self-government. The city-state was the normal and universally recognized social and political unit of the ancient world, and wherever the Romans found it among their subject peoples they left it for the most part unaltered in fundamentals. The Roman Empire itself was the expansion of a city-state, and that fact was not forgotten. Wherever among their subject peoples the Romans found an existing municipal government,

* Bryce : *Studies in History and Jurisprudence*, vol. ii, pp. 130–131.

that government was, as a general rule, retained. There was, it is true, a tendency to uniformity in some directions, but until the third century, at all events, it was the result of assimilation and emulation on the part of the conquered peoples themselves rather than the fruit of a policy of compulsion backed up by the force which the central authority could command. Even the well-known practice of conferring the Roman *civitas* on various towns of the Empire was due to the same causes; it was an honour sought and prized by the towns on which it was conferred; it was not an imposition made by Rome upon her subject peoples. The cities still retained their separate identities. Each had its own deliberative council and enjoyed a greater or less degree of local autonomy; each had its own magistrates to supervise the city's business; each had its own gods to guard the city's welfare. "The ancients habitually viewed the Roman Empire as constituted by and summed up in a vast confederation of municipalities."*

Because of this the Roman Empire flourished. The civilized peoples of the world were united, and peace between them was maintained by the mighty Roman power above them; and that same power kept at bay the barbarian tribes who dwelt beyond their borders and longed for the rich plunder of the neighbouring lands; and when, along with freedom from invasion, the subject peoples retained their municipal organization, membership of the Roman Empire was a valuable privilege rather than an irksome burden. It was not until later days—until that movement towards despotism which reached its climax in the age of Diocletian and Constantine had set in—that subjection to Rome became a burden. Then it was that the governmental organs of Rome herself took on the stamp of despotism, and the local autonomy of the municipalities of the Empire passed away under the "equalizing pressure of the

* Reid: *The Municipalities of the Roman Empire*, p. 4.

central authority." Then it was that the seeds of Rome's decay were sown and the old municipal pride which had given to the Empire its strength began to decay, choked by the weed of despotism. The government of the Roman Empire became something placed over the subject peoples. Those peoples ceased to be identified with it and lost their sense of responsibility for it. The Roman Empire then held together only so long as the government at the centre was able to command sufficient military strength to keep order within its borders. When that condition ceased to exist the Empire fell to pieces ; the subject peoples made no serious attempts to defend it, for they felt themselves to be under it, not part of it. "The first lesson, a lesson of the profoundest consequence, which the municipal history of the Roman Empire teaches is this : that the rise of Roman power was furthered incalculably by the scope which it allowed to local freedom ; that in its great age it rested on a vast system of civic self-government ; that so long as municipal liberty maintained its vigour the Empire flourished ; and that when despotism overflowed the municipalities, then the decay of the great imperial structure went on rapidly to its fatal issue."*

§ 2. COLONIZATION BY THE EUROPEAN POWERS

The Romans were the most successful empire builders of the ancient world, and with the fall of their Empire a great chapter in the world's history was closed. During the Middle Ages Europe came into little contact with the rest of the world. The Islamic Empire formed a great barrier to communication with the rich lands of the East, and the wide spaces of the Atlantic hid the undiscovered lands of the American continent. Europe,

* Reid : *The Municipalities of the Roman Empire*, p. 9

it is true, consumed the products of the East, but of the countries from which those products came little was known. They came by caravan to Constantinople and the Black Sea ports, to Syria and Egypt, and the Italian traders who bought them there had no direct knowledge of the countries which lay beyond. Then suddenly came the era of exploration, which opened the way for that inevitable and irresistible movement whereby the civilization of Europe became the civilization of the world. The discovery of America disclosed a vast field for European colonization, and of the several European countries which established colonies in America England was by far the most successful in solving the problem which new conditions presented, and her success was due to the policy which has found its most complete embodiment in the Dominions.

Spain and Portugal were first in the field. The Bull issued by Pope Alexander VI, in 1493, and the treaty conclude between those two countries, in 1494, and sanctioned by the Pope, gave to the Iberian kingdoms a monopoly of the newly-discovered lands ; but it was a monopoly which neither power was able to use for the purpose of successful empire building. Each gave its language to large tracts of South America ; each gave a civilization which endures to-day among the South American republics ; but neither was able to establish an enduring colonial empire.

Portugal was too intolerant, too much bent on the establishment of monopoly rights, to pay adequate attention to the needs of her colonists. To her a colony was simply a field to be exploited for the benefit of the Mother Country,* and the result was that an over-rigid control on the part of the home government destroyed individual initiative and private enterprise, the very qualities on which successful empire building depends ;

* Lannoy and Vander Linden : *L'Expansion Coloniale des Peuples Européens*, vol. i, p. 137.

and by the middle of the seventeenth century the Portuguese Empire had fallen into decay.

The effort of Spain was equally a failure. Spain concentrated her attention on the precious metals which were found so abundantly in Mexico and Peru ; her object was to gain a monopoly of them for the benefit of the Mother Country. The development of the natural resources of the newly acquired lands held a very subordinate position in her policy.* The very organization of her colonies points unmistakably to that. Her colonists were townsmen who left the tilling of the land and the working of the mines to the labour of Indians and of those whom adverse circumstances compelled to turn to such employment. And along with this went the deadening policy of an aristocratic and unenlightened home government. Such local organization as there was—and there was admittedly some semblance of it in the *cabildos* or municipal council—was subject to continual interference on the part of the imperial authorities. The municipal council met at the pleasure of a governor appointed by the Spanish Government, and that governor even exercised the right to send the councillors to prison when their conduct seemed to him to require such punishment.† The result was that the all-essential stimulation was lacking in Spanish colonial enterprise, and that effect was increased by the fact that the Spanish colonist, himself the product of a subtropical climate, inter-married with the native population and produced an inferior, half-breed race. And so it came about that when the colonist had tasted the sweets of independence and enjoyed the benefits of unrestricted trade, which flowed from Napoleon's conquest of Spain in 1808, he could never

* Lannoy and Vander Linden : *L'Expansion Coloniale des Peuples Européens*, vol. i, p. 242 *et seq.*

† Bernard Moses: *Spanish Dependencies in South America*, vol. ii, p. 373.

again be brought to subordination ; and the Spanish Empire became a thing of the past.

Almost from the beginning the Iberian monopoly was challenged. Holland, France, and England all three disputed the claim which Spain and Portugal made to exclusive rights, and all three enjoyed some measure of success ; but the result of a century of rivalry between them was to establish the complete ascendancy of Britain. And that ascendancy, whatever may have been the motives which induced it and the means by which it was acquired, was certainly maintained because British institutions were far more suitable for colonial government than the institutions of any other state. Down to the nineteenth century, all through the period when the foundations of the European empires were laid, Britain stood alone among the greater European states by reason of the fact that she possessed self-governing institutions ; and self-governing institutions were proved in time to be productive of the very life-blood of lasting colonial enterprise.

The Dutch regarded empire building as a great commercial enterprise to be conducted on a national scale, and their settlements were the trading-posts of a rich company rather than infant states, the offspring of the Mother Country. Commercial control inevitably brought in its train territorial sovereignty ; but that sovereignty was exercised by the directors of a trading company,* and their main object was naturally the furtherance of trade interests. From a purely commercial point of view the policy adopted was wise enough ; it gave to the native subjects justice and order, and it gave to the Dutch shareholders a substantial return on the capital which they had contributed. Its defect lay in the narrowness of vision which saw in a Dutch colony simply a trading-post, a branch of the business of a great commercial company. That the colonists

* Lannoy and Vander Linden : *L'Expansion Coloniale, &c.*, ii, 161.

themselves might have an interest in the lands in which they lived was a point which the accepted theory ignored ; and so it came about that the Dutch settler enjoyed none of the privileges of self-government and had not the means of developing the natural resources of the colony for the sake of internal progress alone, with the result that a Dutch colony was never fully developed, in the only way that a healthy state ever can be developed, by the vigorous efforts of those who had adopted it as a home.

Nor were the French much more successful than the Dutch in the establishment of a permanent colonial empire. "The physiognomy of a government," it has been said,* "may be best judged in its colonies, for there its features are magnified and rendered more conspicuous" ; and France herself exhibited one of the most highly centralized systems in Europe. Almost every branch of human activity was controlled largely by the state, and the movement towards French colonization was not the result of individual enterprise so much as the fruit of a policy supported and directed by the central government. The inevitable result was that a colony, once established, remained under the supreme direction and control of the home authorities. The French colonies were established, in many cases, as the result of heroism without parallel in the annals of European expansion, but their natural development was fatally checked by the over-centralized, feudal institutions which the home government saw fit to establish for their administration. The administrative unit in a French colony was the *seigneurie*. The *seigneur*, a member of a French aristocratic family, was the lord of the vassals who cultivated the soil, and he was subject to a highly-centralized, despotic government which, in its turn, was absolutely subject to the will of the Crown at home. In short, the government of a French

* Tocqueville : *The Old Régime and the Revolution*, p. 299.

colony was a very close imitation of the government of France herself, and it was with such machinery that it was sought to solve the many problems which hard life in a new land presented. There could be, in the long run, but one result. The development of a new country must always depend on the initiative and enterprise of its inhabitants, but initiative and enterprise are plants which cannot grow in the artificial soil which a centralized administration creates. There was too much management and not enough freedom ; the proportion of men and women entering the colony was regulated, the activities of traders were regulated, the amount of profit which a merchant might make was fixed by the government. It is not surprising that France fell behind in the long race for colonial supremacy ; she was too heavily handicapped to win. "Central administration," it has been justly said,* "may produce remarkable immediate results, but it does not encourage natural and steady growth."

§ 4. ENGLISH COLONIZATION — "THE PERIOD OF BEGINNINGS"

It was precisely because it was not the result of centralized effort that English colonization was a success. The English colonist derived little direct assistance from the home authorities, but, on the other hand, he suffered little interference. He was left to solve his own difficulties in his own way, but he took with him that without which no solution would have been possible—self-governing institutions and a knowledge of how to work them.

In 1606 the English merchants to whom Raleigh had transferred his rights in the newly-planted colony of Virginia formed a joint-stock company for the purpose of developing

* Muir : *Expansion of Europe*, p. 40.

their territory. A charter, granted to them by James I, divided the control of the territory in question between two branches of the company—the London branch, which was to take the coast strip from Cape Fear to the Hudson, and the Plymouth branch, which was to take the lands from the Delaware to the Bay of Fundy. In each colony there was to be a council consisting of thirteen members nominated and holding office according to royal instructions. The council was vested with executive powers to "govern and order all matters and causes which shall arise . . . to or within the same several colonies, according to such laws, ordinances, and instructions as shall be, in that behalf, given and signed by our hand or sign manual." There was also to be a council established in England for the "superior managing and direction" of the affairs of the two colonies; and this council was likewise to consist of thirteen persons nominated by the King.*

The form of government thus established was an experiment, and the period of its duration was short. Experience soon made manifest its defects, and, in 1609† and 1612,‡ fresh letters patent were obtained. The Plymouth branch of the company then became a separate corporate body; the persons interested in the settlement of Virginia received corporate rights and a definite tract of territory, with the right to govern the settlers on it. The charters also provided for the establishment of a council in England and nominated the first members thereof; but it was provided that all future vacancies should be filled by the company at its regular meetings.

The first charter granted to the Virginia Company in 1606 should be compared with the charter granted to the Massachusetts Company in 1629. No contrast could be greater. In

* Macdonald: *Select Charters Illustrative of American History*, p. 1, *et seq.*

† *Ibid.*, p. 11, *et seq.*

‡ *Ibid.*, p. 16, *et seq.*

place of government from England there was substituted government by the colonists themselves. The freemen of the company were empowered to elect a governor, a deputy-governor, and eighteen assistants; and these officials were to "applie themselves to take care for the best disposing and ordering of the generall busynes and affaires of (the colony) and the government of the people there." The governor, the deputy-governor, and at least seven of the delegated assistants were to meet once a month to transact executive business, and five times a year a general assembly of the freemen was to be held "to make, ordeine, and establish all manner of wholesome and reasonable orders, lawes, statutes and ordinances, directions and instructions, not contrarie to the lawes of this our realme of England" for the government of the colony.*

Mention should also be made of the type of colonial government set up in 1632, when Maryland was granted to Lord Baltimore. Lord Baltimore and his heirs received full power to make laws for the government of the province, a power which they were to exercise "of and with the advice, assent, and approbation" of the freemen of the colony, who were to be called together "when, and as often as, need shall require." Executive powers were to be exercised by Lord Baltimore and his heirs, who received power to appoint judges, magistrates, and officials, to remit punishments, release and pardon offenders, and to exercise all other functions necessary for the due administration of justice.†

Other colonial constitutions were framed, but each of them partook more or less of the shape of one or other of the three just outlined. It is unnecessary to go further into details. Sufficient has been said to show that no very consistent policy

* Macdonald: *Select Charters Illustrative of American History*, p. 37, *et seq.*

† *Ibid.*, p. 53, *et seq.*

was followed. It was, in short, to use Professor Egerton's description,* "a period of beginnings."

Very soon, however, local government in the colonies began to assume a very definite shape. In spite of a superficial covering of contrasts and peculiarities it became apparent that the normal method of governing an English colony was by means of a governor, an executive council nominated directly or indirectly by the Crown, and an assembly representative of the colonists themselves and wielding full control over matters of local legislation and taxation.

Nowhere was self-government carried to such lengths as it was in the New England colonies. The inhabitants of Massachusetts elected their own governors and conducted uncontrolled their own local affairs; they even went to war with the French without consulting the government of England. In 1643 the four colonies of Plymouth, Massachusetts, Connecticut, and Newhaven formed themselves into a confederation under the name of the United Colonies of New England, and they did so without asking any leave of the Mother Country. Three years later they asserted, in the following words, what they claimed to be their rights: "By our charter we have absolute power of government, for thereby we have power to make laws, to erect all sorts of magistracy, to correct, punish, pardon, govern, and rule the people absolutely." Their connection with England, they said, lay simply in the fact that they owed her allegiance and fidelity, and this they signified "by erecting such a government as the patent prescribes and subjecting ourselves to the laws here ordained by that government."†

These were extensive powers, claimed in theory and, to a large extent, applied in practice; but they enabled the colonists

* *History of British Colonial Policy*, p. 1.

† *Ibid.*, pp. 57, 58.

to control the new and peculiar problems which local circumstances produced far better than any government at home could have controlled them,* and, what is more, they made the colonists responsible for their own local affairs and engendered in them that sense of duty with regard to local conditions which was essential to the development of their newly settled countries.

§ 5. THE OLD COLONIAL SYSTEM

For some time the Empire possessed no systematic organization. England had acquired a colonial empire almost by a series of unforeseen accidents, and the organization of that Empire showed unmistakably the haphazard character of its origin. It was not until the leaders of the Commonwealth and, above all, the statesmen of the reign of Charles II began to direct their attention to the problem that there appeared a definitely conceived imperial policy; and that policy, once established, remained the accepted British policy down to the loss of the American colonies in 1782.

The general principle of the policy was that England owed protection to the colonies in return for their obedience to certain enactments which were designed to secure to the Mother Country definite trade advantages. The British taxpayer had to bear the cost of protecting colonial ships and colonial commerce against the attacks of the Spaniards and the French,

* A good illustration is to be found in the History of the English Common Law in the American Colonies. The colonists took with them the principles of the Common Law, but the forms which the Common Law assumed in their hands were far less technical than the forms which prevailed in England, and far more suited to the new conditions of life. *See* Reinsch: *The English Common Law in the Early American Colonies* (*Select Essays in Anglo-American Legal History*), vol. i, pp. 367–415.

and against the depredations of pirates, the great scourge in those days of sea-borne traffic. To balance this expense the British merchant and the British manufacturer were to enjoy the benefits of a preferential participation in colonial trade.

That was the policy which dictated the famous Navigation Act of 1660,* which ultimately formed the centre of a commercial system embodied in a mass of legislation comprising some hundred statutes in all. The main features of the system may be stated briefly. All trade within the Empire was to be carried in British or colonial ships; imports into the colonies must come from, or through, England; and certain "enumerated" articles, which included many of the most important products of the colonies, could only be exported to England, where, if they were intended for a foreign market, they were to be bought by the foreigner from the English merchant.

Such, in outline, are the main principles of a system which is nowadays the subject of much misconception. The primary object of the colonial system was to develop the wealth and power of the Empire, to make the Empire economically a self-sufficing unit in which the Mother Country and the colonies were to play complementary parts, the Mother Country supplying, as far as possible, the manufactured articles which the colonies used, and the colonies supplying the raw materials and the tropical products which the Mother Country could not produce. No doubt to persons imbued with modern economic doctrines the policy would appear to be conceived in error, but it is not by modern standards that the system should be judged. The economic theory on which the system was based was widely accepted at the time, and it is a mistake to suppose that the English colonies were in a worse position than those

* 12 Car. ii, c. 18.

of other European countries. On the contrary, their position was better. They still enjoyed what the colonies of no other country enjoyed, the benefits of self-government; and every new colony which was established in this period was provided with the accustomed machinery of representative institutions. And, even in purely economic matters, the advantage was not always on the side of England. "A large number of colonial products received especial advantages in the British market by a system of preferential duties, by direct bounties, or by a combination of both, with the result that in a number of instances they acquired a monopoly thereof at the expense of foreign goods with which, under normal conditions, they could not compete . . . and, in addition, the British fiscal system was so arranged that, on payment of slight duties, foreign products could be, and in part were, re-exported in large quantities from Great Britain to the colonies."* Again, Britain often paid bounties on manufactured goods exported to the colonies, thus decreasing their cost to the colonial consumer; and tobacco-growing, a very promising English industry, was prohibited altogether, in order that it might not compete with the colonial-grown article. If the British manufacturer benefited at the expense of the colonies the benefit must be set off against the monopoly which the colonial sugar-planter, the colonial tobacco-grower, and the colonial dealer in other products enjoyed in the English market. Those who complained were the individuals, whether colonial or English, who bore the brunt of particular sacrifices, and, even then, it was not so much the system of which they complained as the particular portions of it which they individually found irksome. The system itself was generally accepted as being the only proper one, and it was maintained in the interests of the whole Empire.

* Beer: *British Colonial Policy*, p. 194.

The mistake was made not so much by those who devised the system as by those who came after them and complacently allowed it to continue when conditions demanded its revision. The system was undeniably successful in meeting the needs for which it was originally devised. Under its influence a group of colonies weak, under-peopled, and undeveloped, attained an appreciable degree of economic progress ; and, under the system of representative government which accompanied it, those same colonies developed each a vigorous political life of its own in which the representative legislature, through its control of the purse, had become the most important factor. But during the half-century which followed the Peace of Utrecht, when Britain was under the rule of the Whig oligarchy, no definite colonial policy at all was applied by the politicians in this country. The Whigs, egregiously self-complacent, took credit to themselves for knowing nothing about colonial affairs, for not reading the colonial dispatches. Had they done so they might have discovered matters which would have disturbed their easy-going self-satisfaction. The self-government of the colonies was rapidly growing and expanding. The original intention had been that the governor and the nominated council should be a check on the elected legislative assembly, but, in practice, the governor was becoming subordinate to the legislature, which controlled the finances of the colony and was often in a position to withhold his salary in case he did not comply with its wishes.* Self-government, in short, was taking its natural and inevitable course, and was extending its control over all that concerned the people to whom it had been granted.

A new problem was shaping itself, the problem of whether it was possible to reconcile increased powers of self-government with the demands of a united empire. But the Whigs made no

* *See* Beer : *British Colonial Policy*, pp. 162–164.

attempt to solve that problem. Indeed, they were not fully aware of its existence, for otherwise they could scarcely have committed the supreme folly of tightening the imperial tie. The times were certainly unsuitable for a system which left the regulation of the foreign trade of the colonies, and in some instances even industry within the colonies themselves, to the British Parliament over which the colonists had no control. And yet the Whigs not only made no attempt to revise the system but, influenced by the English merchants, they increased the severity of the restrictions on colonial trade and prohibited the rise of colonial industries which were likely to compete with similar industries in England. Even then they made blunders. Lazy and timid, they made no attempt to enforce either the restrictions they themselves had made or the regulations of their predecessors. The result was that a large volume of illicit trade grew up between the New England colonies and the French possessions in the West Indies,* and there was added to the irritation which restrictions on the development of colonial self-government produced the baneful effects of smuggling, which grew to such an extent that subsequent interference with it by the home authorities was regarded as a grievance. But for the fact that the colonists needed English protection against the French the Whigs themselves would probably have had to face the consequences of their own misgovernment. As it was, the day of reckoning was postponed, but the evil was still there, and the colonists chafed under the unenlightened policy of the self-complacent home government.

* *See* Egerton: *History of British Colonial Policy*, p. 129, *et seq.*

§ 6. THE CONFLICT WITH FRANCE AND THE WAR OF INDEPENDENCE

It is this fact which explains the erratic and unreasonable policy of the colonists in the face of the French menace. They were men smarting under a grievance, and the pain they suffered warped their views on all-important matters. As Professor Muir has so aptly remarked,* denied responsibility, they became irresponsible. They lost their pride of race and developed a local patriotism, a particularist sentiment, which was bounded by the physical limits of each colony. Deprived of the complete control of their own local affairs, they lost their sense of responsibility for the Empire of which they were part. The ideal of self-government had taken firm root among them, and, thwarted in the full realization of that ideal, they concentrated their attention on purely local matters to the exclusion of matters of wider imperial concern.

Nowhere is this more apparent than in the colonial attitude to the problem of defence against the French and their Indian allies. At the outset an attempt was made to solve that problem by means of voluntary unions of the continental colonies, but the sentiment of responsibility which alone could have made such a union a working possibility was wanting. The Congress which assembled at Albany in 1754 resolved unanimously that a union of all the colonies was essential for their security and defence, and appointed a committee to prepare a plan for such a union. The plan, largely the work of Franklin, when drafted was unanimously adopted. It provided for a president-general, to wield executive powers and to be appointed by the Crown. There was also to be a grand council, consisting of forty-eight members, exercising legislative functions and elected on a basis of population and wealth by the assemblies of the

* *The Expansion of Europe*, p. 60.

various colonies concerned. The power of the council included jurisdiction over Indian affairs, both political and commercial, the raising and payment of soldiers, the erection of forts for colonial defence, and the equipment of vessels for guarding colonial trade off the coasts and on the lakes and rivers. The council was to have powers of legislation and taxation for these purposes, but its acts required the consent of the president-general, and they were also to be submitted for the approval of the King in Council.*

The plan so formulated was to be submitted for the approval of the colonies and, that approval having been obtained, was to be brought into operation by an Act of the British Parliament. But the particularism of the colonies, added to the belief that Great Britain would, in the last resort, undertake the task of their defence, prevented the application of the scheme. All the colonial assemblies either rejected or failed to ratify the plan, and other means of defence had to be sought.

The British Government had eventually to fall back on the old system of requisitions, supported by grants made to the colonies in proportion to the forces which they raised. Pitt realized that on the successful prosecution of the War against France much of the future of the Empire depended. It was easier to raise money in England than to raise men, and Pitt's view was that grants made to the colonies, partly by way of reimbursement and partly by way of encouragement, might remove many of the difficulties in the way of recruiting and also lessen the cost of transporting from Europe all the men that would be required. Until that system was definitely established the greatest difficulty was experienced in getting the colonies to co-operate in the war. They were too jealous of each other,

* Beer: *British Colonial Policy*, pp. 20–21. Macdonald: *Select Charters Illustrative of American History*, p. 253, *et seq.* Franklin: *Autobiography* (ed. Macdonald), p. 155, *et seq.*

too much concerned with their own particular local affairs, and too much afraid of rendering anything more than their neighbours, to co-operate successfully in a common purpose. The grants provided a counter-inducement and made possible a certain amount of practical co-operation. But, even at its best, the co-operation was not cordial enough to be wholly satisfactory, and, after the fall of Montreal in 1760, and the consequent removal of the danger of French invasion, the old jealousies and the old particularism revived. Military operations were hampered. Successive commanders-in-chief had to waste time in vigorous, but only partially successful, attempts to raise colonial levies, and in several instances their attempts to raise troops led them to interfere in internal political disputes which should have been wholly beyond the scope of outside interference. In short, the requisition system proved a failure. "Each colony was intent on seeing what the others were doing, and the action of the least zealous tended to become the standard by which the others regulated themselves. The system was an unfair one. It threw a relatively larger share of the burden on public-spirited colonies, whose activity was thus penalized, while at the same time a premium was placed on neglect of duty."*

Nor was it in purely military matters that lack of co-ordination was demonstrated. Quite a large amount of trade went on between the colonies and the enemy, in spite of the fact that the formal outbreak of war in 1756 involved automatically a legal prohibition of all such intercourse. The French West Indies were not economically self-sustaining; they were concerned mainly with the production of sugar, coffee, indigo, and other similar commodities, and the British continental colonies supplied them with large quantities of foodstuffs. After the formal outbreak of war much of this trade continued, and many

* Beer: *British Colonial Policy*, p. 70.

colonial cargoes passed to the French West Indies through neutral ports, particularly through the Dutch possessions of Curaçoa and St. Eustatius. In order to check this intercourse colonial governors were instructed to lay an embargo on all vessels departing from any colonial port to any destination other than British territory, and even vessels bound for British ports were to be required to give bonds binding them to sail to the destination indicated in their papers. But the response of the colonies to these instructions was far from unanimous. Some of them gave cordial support to the wishes of the British authorities, but others—particularly Pennsylvania and Rhode Island—paid little or no attention to orders from England. The French still continued to receive adequate supplies, and, as the power of France in America declined, the volume of trade between the French West Indies and the British Colonies increased. "It is significant that this trade with the enemy reached its high-mark in 1760, when France was no longer a source of danger to the continental colonies. It would seem that, to many in the colonies, France on the continent of America was the pre-eminent source of danger, but that France in the West Indies was an unfailing source of wealth. The marked provincialism of the colonies blinded them to the fact that any support given to France in the Carribean strengthened her in Canada. What was in its essence a world-wide struggle between France and Great Britain—between two distinct types of civilization—contracted in the narrow vision of the colonies to the dimensions of a local conflict." *

There was obviously something wrong with the Empire's organization when such things were possible. If colonial irresponsibility manifested itself so dangerously in time of war it was likely to find still more dangerous outlets in time of peace. Reorganization and reform became imperative when

* Beer: *British Colonial Policy*, p. 131.

the Treaty of Paris had been concluded in 1763, and Grenville does at all events deserve the credit of seeing that the Whig policy of drift could no longer be pursued. Unfortunately, the policy of reconstruction took, almost inevitably, the form of a tightening of the imperial tie, but the real underlying cause of the trouble lay in the fact that the imperial tie was already too tight. Self-government in the colonies was striving after its own realization, was straining towards greater freedom and a loosening of imperial bonds. But the real issue was obscured for both sides by a mass of irritating superficialities; the symptoms of the disease were so many, so varied, and so confusing that the true nature of the disease itself was never realized.

What the English taxpayer saw was that he had been compelled to furnish the greater part of the cost of the war, and colonial trade with the enemy had weakened the value of his effort; and he wanted the laws of trade more strictly enforced and an investigation of all the possible means of assisting a revenue of which he had had to furnish too large a share. Accordingly, in 1763, an Act * was passed authorizing the employment of the Royal Navy in suppressing the contraband trade on the coasts of Great Britain and Ireland, and on the coasts of the colonies as well; and then attention was directed to ways of replenishing the exchequer. One way was unfortunately too obviously at hand to be ignored. It existed already in the Molasses Act.† That Act had been passed in 1733, and imposed duties on foreign rum, sugar, and molasses imported into the colonies. Its original object was not to raise revenue, but to hinder the development of the French colonies, and consequently the duties which it imposed had been made so high as to be practically prohibitive. It was never seriously enforced until the war, when (sugar and molasses being

* 3 Geo. III, c. 22. † 6 Geo. II, c. 13.

the chief products with which the enemy paid the colonists for supplies) resort was had to a rigorous application of the Act as a means of checking illicit trade. This policy had caused considerable friction at the time, and with the approach of peace and its final conclusion the enforcement of the Act had been considerably relaxed. It was now, however, proposed to use the Act for revenue purposes. Such a course could not but be prejudicial to the most vital interests of the northern colonies, for their economic and industrial life depended largely on the commodities covered by the statute. Its enforcement would necessarily demand an efficient customs service, and so a reform in the customs service was instituted and resulted in a general tightening of the laws of trade.

Such a policy, instituted at a time when the development of colonial self-government necessitated a loosening of the imperial tie, was bound to be productive of irritation. But the matter did not rest at that stage. Circumstances compelled the British Government to proceed still further. The removal of France from Canada did not remove the necessity for an adequate system of colonial defence, and it was recognized in England that the peace was merely a temporary lull in the course of a long struggle. Beneath the surface of current events there was always the possibility of a renewal of the conflict. There was also a difficulty presented by the fact that the greater part of the newly acquired territory on the American continent was occupied by hostile Indians, and the problem of organizing defence against, and regulating intercourse with, these savage neighbours was pressing and important. But Britain deemed it impossible to leave the solution of that problem to the colonies themselves. The results of the Albany Congress in 1754 had demonstrated only too clearly that the colonies were incapable of the joint enterprise which was essential to an adequate control of the situation, and a permanent

ſtanding army in America had to be provided by the Mother Country. But, according to the accepted theory of defence, that was no part of Britain's duty. Defence againſt the Indians was a matter of colonial, rather than imperial, concern ; and the separatism of the colonies compelled Great Britain to shoulder a burden which ought to have been shouldered by the Americans themselves. The British exchequer, however, was depleted, and it was thought to be reasonable that the coloniſts should undertake some share of the coſt of the new commitments. Here again the undue particularism of the colonies presented an obſtacle. To have relied on the goodwill of the colonies and to have asked for a voluntary grant from them would have been productive of nothing more material than a futile conflict of colonial jealousies, and the Mother Country had perforce to rely on legiſlation of the British Parliament.

It was that which precipitated the criſis which the French menace had previouſly held in ſuſpenſe. Such meaſures as the Sugar Act, 1764,* the Stamp Act, 1765,† and their revenue-raiſing companions cannot be ſaid to have impoſed financially undue burdens on the colonies. Their object is expreſsly ſtated in the preamble to the Stamp Act itſelf—to raiſe a further revenue for defraying the expenſe of protecting the American colonies—and they were calculated to bring in a revenue ſufficient to meet between one-third and one-half of the coſt of maintaining the American Army.‡ Nor was the whole of that revenue to be provided by the continental colonies ; all the colonies were to contribute, though the need for the revenue had ariſen mainly out of the neceſſity of maintaining garriſons on the American continent itſelf. That which was ſo diſtaſteful was the fact that taxation by the British Parliament ran counter to that tendency to more complete ſelf-government which

* 4 Geo. III, c. 15. † 5 Geo. III, c. 12.
‡ Beer : *British Colonial Policy*, pp. 285, 286.

had been so marked a characteristic of colonial constitutional development. The colonists were ever ready to resent an encroachment on their local autonomy. The unenlightened policy of the Whigs had stored up that resentment until it had become sufficient to break the fabric of the Empire, so great was its accumulated force and the moral impetus which the new proposals added.

The essentials of the problem were never fully grasped. Self-government, planted in the colonies at the outset, was realizing itself; gradually, but none the less surely, it was extending its scope and expanding to cover all that concerned it. Could that expansion continue to the full and yet be reconciled with the needs of a united empire? That was the problem which underlay the revolt of the American colonies. It is the problem which faces the British Empire to-day, and it will never be solved by an attempt to restrict self-government by the artificial limits of a man-made statutory constitution. Professor Egerton * has told us that Great Britain lost her American colonies because of that "baleful spirit of commerce that wished to govern great nations on the maxims of the counter." She lost them rather because those who controlled her destinies at a critical period of her history did not realize the consequences involved in the natural and inevitable growth of self-governing institutions among free and vigorous peoples.

§ 7. THE FRENCH PROBLEM IN CANADA

From 1782 onwards, for many years the chief centre of interest in the constitutional history of the Dominions is to be found in Canada, where Great Britain was faced with a new problem in Colonial administration. Hitherto her colonies had been, for the most part, inhabited by English settlers, but Canada

* *History of British Colonial Policy*, p. 55.

possessed a French population observing French customs and French laws, and the number of English immigrants was for many years small.

At first the newly acquired territory was governed by a military administration which, however, made no attempt to introduce English laws but endeavoured to follow, as far as possible, the ancient laws and customs of the people.* By the Peace of Paris, 1763, the whole of the French possessions in North America were formally ceded to Great Britain, and shortly afterwards a new form of government was established by a proclamation † which constituted "four distinct and separate governments, styled and called by the names of Quebec, East Florida, West Florida, and Grenada." Of these Quebec alone is of immediate concern for the purpose of the present inquiry. Instructions ‡ were issued directing the governor, as soon as the state and circumstances of the colony should permit, to summon, with the advice and assent of the Privy Council, a general assembly "in such manner and form as is used and directed in those colonies and provinces of America which are under our immediate government," § and this assembly was to have power to make laws for the public peace, welfare, and good government of the colony. The laws, however, were to be made "as near as may be agreeable to the laws of England, and under such regulations and restrictions as are used in other colonies"; and until the legislature could be constituted the inhabitants and settlers were to enjoy the benefit of the laws of England. The governor, with the

* Egerton: *History of British Colonial Policy*, p. 235.

† Kingsford: *History of Canada*, vol. v, pp. 142–145.

‡ Egerton and Grant: *Canadian Constitutional Development*, p. 2, *et seq.*

§ In other words, the legislature was to consist of the governor, a nominated council, and a body representative of the people.

advice of his council, was empowered to establish courts and to try civil and criminal matters, as far as possible, in accordance with the principles of English Law, and a right of appeal to the English Privy Council was given. Until a general assembly could be convoked the governor, with the advice of his council, was to make rules and regulations for the peace, order, and good government of the colonies; but the instructions expressly provided that he could not impose taxes or dues, or deal with matters affecting the life, limb, or liberty of the subject. The general assembly never met. It was convoked, but the French population declined to take the test oath, and, in consequence, the work of administration had to be done by the governor with the assistance of his council.

For many years affairs remained in an unsettled condition. In particular there was much uncertainty as to whether the French or English system of law ought to prevail. The small English population maintained that the French law had been abrogated by the conquest, a view to which it is distinctly difficult to give support.* The larger French population, on the other hand, put forward the proposition (which was undoubtedly correct) that they remained subject to their former laws, except in criminal matters.† There were, in addition, other causes of unrest. The Roman Catholic priests were uncertain as to their position and anxious as to their privileges; the paper money which had been issued by the former French Government depreciated and caused trouble, and, above all, persistent and continual attempts were made by the English Protestant minority to dominate the French Canadians, Roman Catholic in religion and alien in race.

The prevailing discontent led to the passing, in 1774, of

* *See* Campbell *v.* Hall (1774), 20 *St. Tr.*, p. 323.

† English Criminal Law had been introduced in 1763 on account of its more humane principles. *See* Reg. *v.* Coote, L.R., 2 P.C. 599.

the Quebec Act.* The Act frankly admitted that the proclamation of 1763 had been found inapplicable to the circumstances of the province and revoked it and all measures taken under it. It placed the government in the hands of a council consisting of not less than seventeen and not more than twenty-three members nominated by the Crown, and this council was given power to make ordinances, with the consent of the governor, for the peace, welfare, and good government of the province, but all ordinances so made were to be sent to England for approval. The council had no power to levy taxes, but it could authorize the inhabitants of any town or district to levy rates and taxes for the making of roads, the erecting and repairing of public buildings, or " for any other purpose respecting the local convenience and economy of such town or district." The Act further confirmed the French Canadians in the exercise of the Catholic religion and allowed the priests to receive their accustomed dues, and it provided that his Majesty's Canadian subjects were to continue in the enjoyment of their possessions and property and were to be governed by their own laws, except that the criminal law of England was to exclude all others. The test oath was abolished and a simple oath of allegiance substituted. The Act did not by any means grant such a wide measure of self-government as would have commended itself to the revolting American colonies, but it was in many respects well suited to the circumstances of the province. The Canadians accepted it with gratitude, and when, in 1775, the American leaders invaded Canada and made a direct appeal to the French inhabitants to join them that appeal fell on deaf ears, and the invaders, after taking Montreal and laying siege to Quebec, were obliged to withdraw unsuccessful.

* 14 Geo. III, c. 83. *See* also Egerton and Grant: *Canadian Constitutional Development*, p. 22, *et seq.*

Nevertheless, the American War of Independence had considerable influence on Canada ; for after the war some 45,000 * loyalists left the revolted colonies and took up their residence in Nova Scotia, in the district now known as New Brunswick, and in Ontario. By this influx the whole political aspect of Canada was changed. Hitherto the overwhelming majority of the inhabitants had been of French extraction ; but a French type of government became no longer adequate.† The English inhabitants, though still in the minority, were nevertheless sufficiently numerous to form an important part of the population, and, although they had taken the British side in the war and had sacrificed much in order to remain members of a united Empire, they still firmly believed in the right of colonists to manage their own local affairs and they asked in no uncertain voice for representative institutions. On the other hand, the French, who were still in the majority, set little value on a political machinery which they had never known, and they feared, by no means without reason, that the desired change would serve to increase the power of the English minority who were alone experienced in the methods of government which it would introduce.

The problem was met by the Constitutional Act of 1791,‡ and the province was divided into two parts, each with its own government—Lower Canada (which was chiefly French) retaining the old system of laws, but receiving, in addition, representative institutions, and Upper Canada being endowed with institutions of a purely British type. The Act was in the nature of a compromise, but a compromise which, in view of the times and local conditions, was wise, prudent, and (as far as

* Kingsford : *History of Canada*, vol. vii, p. 223.

† Egerton and Grant : *Canadian Constitutional Development*, p. 246, *et seq.*

‡ 31 Geo. III, c. 31.

possible) distinctly practical. It was at first successful in restoring harmony, but soon fresh difficulties arose, and each province had its own peculiar problems. In Lower Canada disputes broke out between the assembly representing the French agricultural interests and the English mercantile communities of the towns. A "campaign of national antipathies" ensued, and in it the French inhabitants aimed at securing a monopoly of political power for their own race. They attacked anything and everything English, and they were opposed by the far from faultless English settlers and officials—the settlers rough and ill-mannered, the officials pompous and overbearing.* In Upper Canada there was no race problem; the great struggle there was for independence of official control and in all essential respects for government by the people, a struggle between the legislature and the executive, in which grossly exaggerated claims were put forward by both sides, but the essence of which was a demand that the officials of the executive government should be responsible to, and removable at the instance of, the legislature.†

For years Canadian affairs were in an unsettled condition, but matters came to a head in 1837, when a few French Canadians in Lower Canada took up arms under the leadership of Papineau in an attempt to establish a French republic on the St. Lawrence, and a similar revolt under William Lyon Mackenzie took place in Upper Canada against the domination of the ruling officialdom. These revolts, occurring as they did at the time of Queen Victoria's accession, attracted considerable attention. In 1838 Lord Durham was sent to investigate the condition of Canada, and in the following year he produced his famous report, "the most valuable document in the English language on the subject of colonial policy." That

* Egerton: *History of British Colonial Policy*, p. 252.

† *See* Lucas: *History of Canada*, p. 270, *et seq.*

report deserves separate treatment, for it marks a turning-point in the history of the British Empire, and in it was contained the seeds from which have sprung those great sister nations whose growth and development have transformed the Empire into a partnership held together not by the oppressive weight of imperative legal rules but by those silken ties of common ideals and mutual regard which, "though light as air, are strong as links of iron."

Chapter II. *Responsible Government*

§ 1. LORD DURHAM'S REPORT

THE revolt of the American colonies had raised a question which never before had been raised in the whole history of human progress. It was the question of whether imperial unity could be reconciled with the natural and inevitable growth of self-governing institutions, whether it was possible for a group of vigorous communities, each of which was passionately desirous of controlling its own destinies, to combine together for the common and greater purpose of empire. Lord Durham, when he commenced his investigation, found that the same question was shaping itself in Canada, and he saw clearly that at the root of colonial discontent lay the fact that constitutional development in the colonies had lagged behind constitutional development in the Mother Country.

Since 1688 an important change had taken place in the British Constitution. So far as legal form was concerned the constitution remained much the same, but there had grown up a whole body of customary rules which had greatly altered the actual machinery by which the constitution worked : the main outlines of the Cabinet system had been evolved, and executive power, though still legally in the hands of the King, had come in practice to be exercised by a body of men, nominally the King's servants and appointed by him, but in reality owing their tenure of office to the fact that they could command the support of a majority in the House of Commons. But while the working constitution of the United Kingdom had changed so much the working constitutions of the colonies had changed but little. The colonies had attained to representative institutions at an early period ; but the representative legislatures had acquired little control over the officials of the executive government. The executive government was still carried on

by persons nominated by the Crown, many of them inefficient and wholly incompetent for the work they had to do.

Lord Durham saw that the one solution to the problem of colonial discontent was to give to the representative assemblies control over administrative business by the introduction of responsible government. In his report, which was presented to Parliament in 1839, he recommended as a first step the union of Upper and Lower Canada and then the introduction of responsible government. He regarded responsible government as the necessary consequence of representative institutions, and held that it was impossible for the Crown to carry on the government in unison with a representative body unless it should consent also to carry it on by means of persons in whom that body had full confidence. "In England," he said, "this principle has been so long considered an indisputable and essential part of our constitution that it has really hardly ever been found necessary to inquire into the means by which its observance is enforced. When a ministry ceases to command a majority in Parliament on great questions of policy its doom is immediately sealed, and it would appear to us as strange to attempt, for any time, to carry on a government by means of ministers perpetually in a minority as it would be to pass laws with the majority against them."*

The trouble, in short, arose from the fact that constitutional development in the colonies had lagged behind constitutional development at home, that representative institutions in the colonies had been unaccompanied by that ministerial responsibility which the constitutional history of Great Britain had shown to be a necessary accompaniment to representative institutions. The constitutions of the colonies required to be

* *See* Lord Durham's Report (ed. Lucas), vol. ii, p. 277, *et seq.*, and Houston: *Documents Illustrative of the Canadian Constitution*, p. 293, *et seq.*

refashioned on the model of the British Constitution, and it is interesting to note that just as the introduction of responsible government at home had been the result, not of legislative enactment and legal change, but of the development of constitutional conventions or usages, so also the responsible government of the Dominions became a matter, for the most part, not of statute, but of convention, and arose in a purely informal manner from private instructions issued by the Colonial Office to the governor, directing him to choose as his ministers those who could command a majority in the colonial legislature.*

In 1840 an Act† was passed to carry into effect Lord Durham's recommendations, but in all its sixty-two clauses there is only a single section ‡ which makes any reference to the colonial executive, and that is merely a reference to "such executive council as may be appointed by Her Majesty for the affairs of the Province of Canada." It was not, in fact, until 1847 that the full principle of responsible government was applied in Canada. In that year Lord Elgin, the Governor-General, was instructed to appoint as members of the executive council only such persons as were qualified by reason of their possession of the confidence of the assembly. The principles on which he acted in carrying out his instructions are thus stated in a letter to his wife: "I still adhere to my opinion that the real and effectual vindication of Lord Durham's memory and proceedings will be the success of a Governor-General of Canada who works out his views. Depend upon it, if this country is governed for a few years satisfactorily Lord Durham's reputation as a statesman will be beyond the reach of cavil."§ In the next year occurred an opportunity for

* *See* Keith: *Responsible Government in the Dominions*, vol. i, p. 59, *et seq.*

† 3 and 4 Vict., c. 35. ‡ Section 45.

§ Egerton and Grant: *Canadian Constitutional Development*, p. 312.

Lord Elgin to put his principles into practice. The assembly passed a vote of no-confidence in his ministers, with whom he himself had worked quite harmoniously. The ministers at once resigned and Lord Elgin made no attempt to keep them in office ; he accepted the verdict of the assembly and appointed a new ministry from members of the opposition, and then reported his action to the Secretary of State with a request for the issue of the usual warrants for the appointments.*

Since that time the maxims of responsible government have been consistently applied in practice, and Lord Elgin's action deserves the closest attention. It was not by statutory enactment that responsible government became a reality in the Dominions ; it was by the conduct of Lord Elgin and his successors in the governorship, who established it as a constitutional convention, a maxim of constitutional morality, which came to be generally accepted and invariably observed, and the introduction of responsible government into the Dominions is one among the many illustrations, with which the constitutional history of Britain and the British Empire abounds, of the fact that highly important constitutional changes can be adequately and successfully accomplished without the necessity for any such schemes of statutory reorganization as certain political philosophers are so fond of holding up for our admiration.

The introduction of responsible government, accomplished as it was in a manner impossible among any other than a people with great respect for constitutional and political tradition, was at the same time essentially British in its characteristics, and even to-day, in spite of some superficial resemblances due to the common possession of federal types of government, there is a fundamental difference between the Constitution of the United States and the Constitution of Canada.

* Keith : *Responsible Government in the Dominions*, vol. i, p. 19.

The essential principle of the American system is "the separation of powers," a definite and legally marked division between the executive and the legislature, both in the federal government and in the States, each being independent of the other and each being directly elected by popular vote. The essential principle of the British system, on the other hand, lies in the fact that there is one determining authority on all points; the executive is subordinated to the legislature, the Cabinet depends for its continuance in office on the fact that it can command the support of a majority in the House of Commons.

The difference is a fundamental one, and yet the Americans of 1789 thought that they had devised a constitution which was in most essential respects a copy of the British. But the peculiar circumstances of the times prevented that copy from being completely accurate. The political Bible of the Americans was Montesquieu's *Esprit des Lois*, in which, contrasting the English system with the despotism of continental Europe, the author showed that England was the one state which consciously and successfully aimed at the attainment of public and private liberty.* Accustomed as he was to the French system, under which legislative and executive powers, and to some extent judicial powers also, were exercised by or under the control of the monarch, Montesquieu was led to the conclusion that English freedom was due to the fact that in this country legislative, executive, and judicial powers were in the hands of separate authorities.† It was not unnatural that Montesquieu should over-estimate the executive power of the monarch and under-estimate the powers of control possessed by Parliament; and, moreover, his view was one which the revolted colonists, by reason of their recent experiences, were

* "*Il y a aussi une nation dans le monde qui a pour objet direct de sa constitution la liberté politique.*"—*Esprit des Lois*, liv. xi, chap. iii.

† See *Esprit des Lois*, liv. xi, chap. vi.

particularly prone to adopt. Their view was influenced by the discretionary powers which George III had exercised, particularly in the sphere of colonial policy, where the personal discretion of the King was greater than in purely domestic affairs. The position was, of course, due to transitory causes, but that was a point which could not, in those days, be readily perceived, for the Cabinet system was still immature and Englishmen themselves were not fully aware of its principles. The result was that the Americans adopted the system of the "separation of powers" *; they made definite, statutory limits to the powers of their executive, and made it a body whose members could not belong to the legislature, and, lest they should be merely setting up one arbitrary body in place of another, they confined the powers of the legislature also within statutory bounds, and, having done that, they established the judiciary as an independent co-ordinate authority to be the guardian of the constitutional limits that had been devised.† But by the time when responsible government was introduced into Canada the Cabinet system had developed towards maturity, and the Canadians, not having broken away from the Empire as the result of friction, were able to adopt it. It is a delicate system, "a system of exquisite equipoise," made up of political habits, conventions and traditions, too fine to be drawn within the rigid words of a statutory enactment, but always flexible, always capable of being developed; and its extension from the Mother Country to the Dominions is a matter of very real importance, for the political traditions which it engenders

* "The accumulation of all powers, legislative, executive, and judicial in the same hands, whether of a few or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny."—*The Federalist.*

† For a comparison of the American and British systems *see* Bryce: *American Commonwealth*, vol. i, chap. xxv.

render far easier than otherwise would be the case co-operation between the component parts of the British Empire.

§ 2. THE EXTENSION OF RESPONSIBLE GOVERNMENT

The same whole-hearted treatment which was applied to the solution of the difficulties of Canadian government was applied also when similar problems began to arise in other British colonies; and the same community of institutions was reproduced, not as the result of imposition by the central authority, but as the result of free choice on the part of the daughter peoples themselves.

Nothing illustrates this more strikingly than the introduction of responsible government into the Australian colonies. In Australia the first settlements had been convict stations rather than colonies, and the governor had made and amended rules and regulations much as he pleased; but the growth of the population and the increasing numbers of free settlers soon rendered such a system impossible, and the Australian colonies were early endowed with the accustomed machinery of representative institutions.* Nor did it need the experience of much friction before representative government was allowed to develop into responsible government. On the contrary, such a development was recognized as natural and inevitable when once Lord Durham's recommendations had been carried out in Canada, and, in 1852, the British Government took a step, which has no parallel in all the annals of European expansion, and empowered the various Australian colonies to decide for themselves the forms of government under which they wished to live.† The result was striking. Every colony, without exception, reproduced in all its essential

* *See* Keith: *Responsible Government in the Dominions*, vol. i, pp. 7, 8.

† Parl. Papers, March 14, 1853.

outlines the system of government in force in the Mother Country,* adopted a legislature of two chambers, and concentrated responsibility by the subordination of the executive to the legislature.

Two years later the same system was extended to New Zealand. In that colony there had been, at first, little real organization of government until, in 1840,† a Crown Colony form of administration was introduced. Naturally enough the population did not find the Crown Colony system entirely satisfactory, and in 1852 ‡ representative institutions were introduced. The House of Representatives, which met for the first time under the new system in 1854, set itself at once to consider the question of responsible government, and the result of a few months of discussion and negotiation was that, on December 8, 1854, there was issued a dispatch § in which the imperial authorities approved of the system of responsible government as being the best possible method of developing the interests of the community, and the system was applied forthwith.

A year later responsible government was conceded to Newfoundland,|| and of all those parts of the British Empire which are now known as the Dominions, of all those parts, that is to say, in which the white settlers predominated over the natives, South Africa alone remained excluded from the benefits of the new constitutional development. In South Africa, however, peculiar conditions were responsible for the delay. The abolition of slavery throughout the British Empire in 1833, noble act though it was, produced grave difficulties in South

* Keith: *Responsible Government in the Dominions*, vol. i, pp. 25–39.
† 3 and 4 Vict., c. 62.
‡ 15 and 16 Vict., c. 72.
§ Parl. Papers, H.C. 160, 1855.
|| *See* Keith: *Responsible Government in the Dominions*, vol. i, pp. 6, 7.

Africa. The Boer farmers were a slave-owning class, and regarded the native as an inferior being who was destined by nature to live a life of servitude for the benefit of his white masters ;* and the belief, fostered by the missionaries, that the Boers could not be trusted to deal fairly with backward peoples was the cause of prolonged friction between the two white peoples in South Africa and was a most potent factor in delaying the establishment of self-governing institutions.†

In the meantime responsible government was flourishing in those parts of the Empire where it had been established. The colonies had been left to work out their own salvation and to administer their own affairs in the manner which they deemed most fitting to their requirements. Their powers of self-government grew with exercise, their political horizons widened, and the way was prepared for those larger federations and unions which form the fit consummation of the efforts of such men as Lord Durham and Lord Elgin. In 1867, less than thirty years after Lord Durham's report was presented to Parliament, the Dominion of Canada was founded, and in 1900 the Commonwealth of Australia Constitution Act was passed.‡ It was a notable fact for Great Britain to have produced such children, and it had its influence on African affairs. The long friction between the two white races in South Africa came to a head in the Boer War (1899–1902) ; and, four years after the treaty of peace which added the Transvaal and the Orange Free State as conquered territories to the British Empire, the British Government boldly established in both the full institu-

* The Boer attitude is typified by a law of the Transvaal to the effect that " there shall be no equality in Church or State between white and black." *See* Muir : *Expansion of Europe*, p. 216.

† Parl. Papers, H.C. 181, 1870.

‡ For an account of the formation of these unions *see* Egerton : *Federations and Unions within the British Empire.*

tions of responsible government. Five years later the four divided provinces were combined in the Union of South Africa and left to work out their own solution to their own problems by means of institutions which reproduced those of Britain and the British Dominions. It was a bold step, but the events of the recent war produced its justification. One of the most gallant of the Boer generals who opposed us twenty years ago became Prime Minister of the new Dominion and crushed, with Boer forces, a rebellion stirred up by German intrigue among the more ignorant of his fellow countrymen, and then, at the head of a force half-Boer and half-British, he proceeded to the conquest of German South-West Africa.

Such incidents are to be found in the history of no other Empire. We are often told that the statesmen who granted responsible government to the Dominions regarded it as a stepping-stone to peaceful and complete separation. The question of motive, however, may be left to those who relish such investigations. One thing is certain—the policy adopted has been a great success ; it has enabled the colonies to develop into mighty nations, and any attempt to arrive at the disintegration of the Empire, if it ever was contemplated, has been successfully foiled by the colonies themselves. It could hardly be otherwise, for the colonists could have very little inducement to sever the imperial connection when they could have all the benefits of empire and yet be free to conduct their own affairs in their own way. The history of responsible government within the British Empire has proved the truth of that " eternal law " which Burke so eloquently enunciated when he said that the best hold upon the colonies lay " in the close affection which grows from common names, from kindred blood, from similar privileges and equal protections. These are ties which, though light as air, are strong as links of iron. Let the colonies always keep the idea of their civil rights associated with your

government ; they will cling and grapple to you, and no force under heaven will be of power to tear them from their allegiance. . . . As long as you have the wisdom to keep the sovereign authority of this country as the sanctuary of liberty, the sacred temple consecrated to our common faith, wherever the chosen race and sons of England worship freedom they will turn their faces towards you. The more they multiply, the more friends will you have. . . . Slavery they can have anywhere. It is a weed that grows in every soil. They may have it from Spain, they may have it from Prussia ; but until you become loſt to all feeling of your true intereſt and your natural dignity freedom they can have from none but you."*

§ 3. THE DEVELOPMENT OF RESPONSIBLE GOVERNMENT

There is, however, one important faſt about responsible government which is often overlooked. Responsible government is a seed which, if planted in a proper soil, will germinate and grow until it attains its full dimensions ; and it is no more possible to draw a permanent line between those subjeſts in respeſt of which a people may enjoy responsible government and those subjeſts in respeſt of which they may not than it is to fix the size of an oak tree before the acorn is planted. This is a point which Lord Durham himself failed to notice. " Perfeſtly aware," he wrote, " of the value of our colonial possessions and ſtrongly impressed with the necessity of maintaining our connection with them, I know not in what respeſt it can be desirable that we should interfere with their internal legislation in matters which do not affeſt their relations with the Mother Country. The matters which so concern us are very few.

* Burke : *Conciliation with America.* (House of Commons, March 22, 1775.)

The constitution of the form of government—the regulation of foreign relations, and of trade with the Mother Country, the other British colonies, and foreign nations—and the disposal of public lands are the only points on which the Mother Country requires a control." In other words, Lord Durham thought it possible to draw a permanent line between matters of colonial or internal concern and matters of imperial concern, to assign the control of internal affairs to the colonial legislatures and governments and to leave matters of imperial concern in the hands of the British authorities. Experience has shown, however, that such a line is impossible. Hardly had responsible government come into operation when the colonial legislatures began to encroach on those subjects which Lord Durham had thought to be outside their sphere, for one by one they were found to be subjects which had a close connection with internal affairs.

At the outset the colonists acquired control over their own vacant lands. In legal theory the ultimate ownership of those lands remained, and still remains, vested in the Crown,* but the Act † which, in 1840, united Upper and Lower Canada granted to the Canadian Parliament complete control over all lands situated within the border of those two provinces, and when responsible government was extended to the other provinces of British North America full power to deal with the local lands was in each case granted in return for a civil list. In 1852 power to deal freely with all lands situated within the colony was conceded to the legislature of New Zealand ;‡ in 1855 similar powers were handed over to the legislatures of those Australian colonies which enjoyed responsible government ;§ finally, Cape Colony in 1872, Natal in 1893, and the

* A.-G. of Honduras *v.* Bristowe, 6 A.C., 143.
† 3 and 4 Vict., c. 35.
‡ 15 and 16 Vict., c. 72. § 18 and 19 Vict., c. 56.

Transvaal and Orange River Colonies in 1906 were placed in the same position.*

Likewise, the power of the colonies to alter their own constitutions was claimed and conceded at an early stage. It was admitted in different forms and subject to different conditions in nearly all the early statutes which set up representative colonial legislatures,† and it was placed on a much more certain footing in 1865 by the Colonial Laws Validity Act,‡ which provided that any colony having a representative legislature (*i.e.* a legislature at least one-half of the members of which are elected) should have full power to pass laws for altering the constitution, "provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony"—a proviso which, so far as the Dominions are concerned, means in practice little more than this: that in the making of constitutional changes such procedure must be observed as is laid down in the statutes framing the constitution. Thus the Australian Constitution can be changed by an Act passed by an absolute majority in both Houses of the Commonwealth Parliament, and approved, within six months afterwards, by a majority of the electors voting in a majority of the States, and also by a gross majority of all the electors who vote in all the States; and similar powers can be exercised, by different methods of procedure, by the Union Parliament of South Africa, by the Parliament of New Zealand, and by the legislature of Newfoundland. Canada alone among the Dominions has a legislature powerless to alter the constitution It is

* *See* Keith: *Responsible Government in the Dominions*, vol. ii, pp. 1047, 1048.

† *See* Jenkyns: *British Rule and Jurisdiction beyond the Seas*, appendix viii.

‡ 28 and 29 Vict., c. 63, S. 5.

provided by the British North America Act that the constitution of the Dominion shall be altered by the Imperial Parliament alone,* but, as Professor Dicey has pointed out,† the exception is more apparent than real, for it is impossible that the Imperial Parliament would refuse to give effect to any change clearly desired by the inhabitants of Canada,‡ and, for all practical purposes, it is possible to assert that the Dominions have acquired the power of altering their own constitution.

Thus two of the matters which Lord Durham thought to be of direct concern to the Mother Country were found to affect the internal concerns of the Dominions, and so passed under the control of the Dominion peoples. Nor did the movement stop at this point. Before long the Dominions began to assert their powers over the imposition of customs duties and the control of their overseas commerce with other parts of the Empire and with foreign nations. The traditional view with regard to these had been that they were matters which directly concerned the problem of imperial unity ; and, being so, they were within the undoubted competency, if not within the exclusive jurisdiction, of the Imperial Parliament. But in the nineteenth century that doctrine was profoundly modified as the result of the great economic revolution which resulted in the triumph of the principles of Free Trade in the commercial policy of this country. It was altogether inconsistent with those principles that the colonies should be regarded, as formerly they had

* 30 and 31 Vict., c. 3 ; and *see* 34 Vict., c. 28 ; 38 and 39 Vict., c. 38 ; 49 and 50 Vict., c. 35 ; 5 and 6 Geo. V, c. 45 ; 6 and 7 Geo. V, c. 19.

† *Law of the Constitution*, p. 106.

‡ It has been intimated that the Canadian Government contemplates asking the Imperial Parliament to amend the British North America Act so as to admit of constitutional amendments being made by the Dominion Parliament, subject to the approval of all the Provincial Legislatures.

been, as existing for the benefit of the trade of Great Britain. Some new basis for the commercial relations between the Mother Country and her colonies became necessary, especially when the colonies showed themselves to be by no means as ready as Great Britain to accept the new economic doctrines. An important step was taken in 1842 when the Imperial Government undertook to secure the passage through Parliament of a Bill to admit Canadian wheat and flour into the United Kingdom, provided that the Canadian Parliament would meet the views of the home authorities by imposing a higher duty on wheat imported into Canada from the United States. The arrangement was carried out by legislation on both sides, and the imperial statute is memorable because, during its passage through Parliament, leading statesmen admitted that Canada, in virtue of the possession of responsible government, ought to enjoy the right of framing her own tariff and of regulating her own trade and commerce as she chose.*

But the benefits resulting to Canada from the preferential arrangement were withdrawn by the repeal of the Corn Laws in 1846. Canadian merchants found themselves in an awkward predicament, for colonial shipping was still hampered by the Navigation Acts. An acute commercial crisis followed, and prominent Canadian business men of all shades of political opinion advocated separation from Great Britain and union with the United States.† Fortunately, however, timely measures were taken to allay the discontent ; in particular, the Navigation Acts were repealed in 1849.‡ But even then,

* Todd : *Parliamentary Government in the British Colonies*, p. 177. Four years later statutory effect was given to the principle thus admitted. *See* 9 and 10 Vict., c. 94.

† *See* Egerton and Grant : *Canadian Constitutional Development*, p. 333, *et seq.*

‡ 12 and 13 Vict., c. 29.

by a singular inconsistency, the view was held by prominent statesmen that the commercial policy of the Mother Country should dictate the commercial policy of the colonists. The colonists, however, were by no means willing to leave such views unchallenged. In 1859 the Canadian Parliament enacted a tariff of a distinctly protective character, and certain manufacturers of Sheffield protested against it in a memorial addressed to the Colonial Secretary, the Duke of Newcastle. A copy of the memorial was transmitted to the Governor-General by the Duke, who stated that he felt that there was much force in the objections, and expressed his regret that "the experience of England, which has fully proved the injurious effect of the protective system and the advantage of low duties upon manufactures . . . should be lost sight of, and that such an Act as the present should have been passed." In reply Mr. (afterwards Sir) Alexander Galt thus stated in no equivocal terms what he considered to be the true position and the rights of the Canadian Legislature: "Respect to the Imperial Government must always dictate the desire to satisfy them that the policy of this country is neither hastily nor unwisely formed, and that due regard is to be had to the interests of the Mother Country as well as of the province. But the Government of Canada, acting for its legislature and people, cannot, through those feelings of deference which they owe to the imperial authorities, in any way waive or diminish the right of the people of Canada to decide for themselves both as to the mode and extent to which taxation shall be imposed. . . . Self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada. . . . The Imperial Government are not responsible for the debts and engagements of Canada. They do not maintain its judicial, educational, or civil service: they contribute nothing to the internal government of the country, and the provincial

legislature, acting through a ministry directly responsible to it, has to make provision for all these wants ; they must necessarily claim and exercise the widest latitude as to the nature and extent of the burthens to be placed upon the industry of the people."*

No attempt was made by the home authorities to question the soundness of this view, and the tariff passed into law. Another point had been gained ; an addition had been made to the list of matters originally thought to be of direct concern to the Mother Country which time had brought within the ever-widening sphere of responsible government.

And a still further addition was to be made—in this case at the instance of the colonies south of the equator. The tropical climate and sparse population of those countries made them very attractive to immigrants of Asiatic and African origin, and the desire of the colonists to avoid the dangers,† which the experience of different parts of the American continent led them to anticipate from the existence side by side of white and coloured races, caused them to assert their right to control the ingredients of their own future population, even to the extent of excluding British subjects of non-European descent. It was a strong claim to make, but it ultimately met with substantial success.

The problem originated in 1848, when the Moreton Bay district of Queensland was opened to free settlers, and, in consequence of considerable difficulty which they experienced in obtaining labour, the squatters began to import Chinese to serve as labourers. The subsequent discovery of gold in 1851 led to a further and much more serious Chinese influx. "They

* Egerton and Grant : *Canadian Constitutional Development*, pp. 348, 349.

† *See* Reeves : *State Experiments in Australia and New Zealand*, vol. ii, pp. 353, 354.

landed in thousands at Port Philip, bound for Bendigo and Ballarat." The white inhabitants were quick to take alarm, and a series of statutes * was passed to meet the new situation and to impose restrictions on Chinese immigrants. In 1888, there was again a sudden panic, and rumours of a Chinese influx spread abroad. The Legislature of New South Wales passed a Bill which, "short of shutting out Chinese in so many words, could hardly have gone further,"† and a measure framed on rather milder lines was passed by Victoria.

For some time after this matters were quiet, and there was no legislation directed, in so many words, against the Chinese. In the meantime, however, there came an influx of Japanese, Indians, and other Asiatic peoples, as well as coloured men from Africa, and a conference of Australian Premiers, held at Sydney in 1896, decided to extend the anti-Chinese legislation to other Asiatic and coloured peoples. Among the legislation presented for this purpose were two Bills, one from New South Wales and the other from South Australia, which included in their operation not merely aliens, but also British subjects of Asiatic descent, and which on that account raised a very awkward question, inasmuch as persons of the latter class naturally claimed perfect freedom to come and go in virtue of their British citizenship. The matter was discussed at the Colonial Conference of 1897, when Mr. Chamberlain explained the difficulties of the Imperial Government. "To exclude by reason of their colour, or by reason of their race," he said, "all Her Majesty's Indian subjects, or even all Asiatic subjects, would be an act so offensive to those peoples that it would be most painful, I am quite certain, to Her Majesty to have to

* *See* Keith: *Responsible Government in the Dominions*, vol. ii, pp. 1075–1080.

† *See* Reeves: *State Experiments in Australia and New Zealand*, vol. ii, pp. 334–338.

sanction it."* At the same time he suggested means of removing some of the most objectionable features of the Bills without impairing their efficiency for securing their main objects, and he outlined a policy which should be aimed at immigrants, not merely on account of race or colour, but on account of undesirableness, a matter which could be tested by the immigrant's ability to write from dictation in one of several European languages. Most of his suggestions were adopted. The Bills were modified and were then allowed to come into operation. But the colonists had gained their point, for it mattered little to them whether an intending immigrant was to be shut out for being a native of India or for being unable to write English or French or German. Until the education of Asiatics reaches a considerably higher level the result will be the same by whichever method it may have been obtained.

Nor have all the Dominions kept within the policy which Mr. Chamberlain suggested to them, and the very wide powers of legislating on the matter under discussion, which the Dominions now exercise, can be gauged from the Immigrants Restriction Act which the Transvaal Legislature passed in 1907. To that Act, it has been said, "no parallel can be found in previous legislation. . . . (It) will debar from entry into the Transvaal British subjects who would be free to enter into any other colony by proving themselves capable of passing the educational tests laid down for immigrants. It will, for instance, permanently exclude from the Transvaal members of learned professions and graduates of European universities of Asiatic origin who may in future wish to enter the colony."†

* Quoted by Keith: *Responsible Government in the Dominions*, vol. ii, p. 1081.

† Parl. Papers (Cd. 3887), pp. 52, 53.

Thus one by one those matters which Lord Durham thought to be of direct concern to the Mother Country passed exclusively into the control of the Dominions. At the time of the outbreak of war the control of foreign relations alone remained to the Imperial Government, and even in that connection, as the next chapter will show, very important inroads had been made into the original practice. The Empire had been faced for some time with the problem of how that practice could be put away and a newer doctrine applied more consonant with the needs of the times and more fitted to the national aspirations of the Dominion peoples. Recent events have made the speedy solution of that problem imperative. The Treaty of Peace and the League of Nations have given the Dominions a substantial share in the control of their own foreign affairs,* and we have entered on the final stage of the process of constitutional development which commenced when responsible government was accorded to the Dominions. Forms of government have their natural history just as much as living creatures and will just as inevitably pass through the several stages of their development; and responsible government, granted to a people who understand it and know how to work it, will sooner or later include in its ever-widening sphere every matter which directly or indirectly affects the government of the people to whom it is given. The problem of the constitutional future of the Empire is not due to the peculiar circumstances of to-day; those circumstances have doubtless accelerated its development, but the problem itself originated eighty years ago in Lord Durham's famous report. Viewed in the light of history, the constitutional problem with which to-day the Empire is faced is not, as so many advocates of Imperial Federation would seem to believe, a question of forging tighter constitutional links between Great Britain and the Dominions. It is the very

* *See* Post, pp. 67, 68.

reverse ; it is a question of devising for the co-ordination of empire policy a common organization which shall at the same time be compatible with that full realization of responsible government which the Dominions will enjoy, if not within the Empire, then without.

Chapter III. *Foreign Affairs and Defence*

§ I. THE TREATY-MAKING POWER IN THE BRITISH EMPIRE

IN the concluding paragraph of the last chapter it was pointed out that the British Empire to-day is faced with the problem of devising for the co-ordination of empire policy some common organization which shall at the same time admit the Dominions to that adequate share in the control of foreign affairs which their national aspirations and development demand.

No doubt it is true, as a matter of strict legal theory, that every law passed by a Dominion legislature is subject to disallowance by the Imperial Government, and that the Imperial (*i.e.* British) Parliament could pass with regard to the Dominions any enactment it might please, and such an enactment would, from a legal point of view, be perfectly valid and binding on every person in the Dominions. But these rights of the imperial authorities are in practice exercised only on the very rarest occasions, and in recent times the consistent policy of the Imperial Government has been to give the fullest scope possible to Dominion autonomy. Admittedly much can be said in favour of the formal abolition of some of these obsolete ties; but such questions are of detail only, and our special concern is with outstanding facts. That which constitutes the most galling limitation on the Dominions is not the overriding power of the British authorities, (which exists in theory rather than in practice), but the disability which arises from the fact that the Dominions have not been, from the point of view of International Law, fully sovereign States. International Law has not recognized the Dominions as autonomous and independent; it has regarded them in the light of dependencies of the United Kingdom,* and consequently their foreign affairs have had to be conducted through the medium of the treaty-making power of

* *See* Oppenheim: *International Law*, vol. i, p. 219.

the United Kingdom—in other words, through the medium of the King acting on the advice of his ministers, who are responsible, not to the legislature of any Dominion, but to the Parliament at Westminster alone.

"With regard to foreign concerns," says Blackstone,* "the sovereign is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the sovereign, therefore, as in the centre, all the rays of his people are united. . . . What is done by the royal authority, with regard to foreign powers, is the act of the whole nation. What is done without the concurrence of the Crown is the act only of private men." The King, acting always upon the advice of his responsible ministers, enjoys the sole right of making treaties, of declaring peace and war, and generally of conducting all the foreign affairs of the Empire; and the act of the King in any of these matters is, *prima facie*, regarded by International Law as the act of, and as binding on, the whole Empire without the necessity of any further sanction.

But to direct attention for the time being to treaties, although the Crown has the sole treaty-making power of the Empire, there are certain subjects with regard to which its treaty-making power is imperfect and requires to be supplemented by legislation. The exact number of such subjects is uncertain, for in England there is not, as in many foreign countries, any codified list of subjects on which the Crown has or has not power to bind the subject without legislative sanction. Nevertheless, in cases of doubt, it is usual either to obtain statutory authority in advance or expressly to stipulate in the treaty that its terms shall not become operative until that authority has been obtained;

* *Commentaries*, (14th ed.), p. 252.

and it is possible to compile, from judicial decisions and from state practice, a list of a few subjects with regard to which legislative sanction will usually be obtained to any treaty.

Thus it may be asserted with safety that any treaty which imposes taxation upon or interferes with the private rights of the subject must have legislative sanction before it can come into operation in any part of the British Empire. In the well-known case of *Parlement Belge*,* a steam-tug (the *Daring*), had sustained damages in a collision which the owners alleged was due to the bad navigation of the *Parlement Belge*. The latter was a Belgian vessel employed in the service of carrying mails between Dover and Ostend, and it was sought to defeat a claim to damages by showing that, as the result of a convention entered into between the Queen of England and the King of Belgium, but not in this country confirmed by statute, the *Parlement Belge* was entitled to be treated in British ports as a public vessel of war, and that as such she was exempt from the jurisdiction of the courts of law. But Sir Robert Phillimore gave judgment against her and held that the treaty-making power of the Crown, unaided by the legislative authority of Parliament, could not be used to confer upon a ship a public character which otherwise it would lack and thereby to deprive a British subject of a right of action to which by law he was fully entitled. "That," he said, "was a use of the treaty-making prerogative of the Crown . . . without precedent, and in principle contrary to the laws of the constitution."†

Nor does the prerogative of the Crown to enter into treaties

* (1879) 4 P.D. 129.

† The decision was reversed on appeal but on a totally different ground, and the point may be taken to have been decided; *see* also Walker *v.* Baird (1862), A. C. 491. Nor is recent state practice in the matter in any way at variance with this view; *see* 4 and 5 Geo. V, c. 50; 5 Geo. V, c. 1; 6 and 7 Geo. V. c. 39; 7 and 8 Geo. V, c. 26; 9 and 10 Geo. V, c. 38; 10 Geo. V, c. 6; 11 and 12 Geo. V, c. 11.

for the cession of territory appear to be much more extensive. This point is, however, open to some doubt; and it would, perhaps, be more consistent with technical accuracy to say that, while as a matter of strict legal theory the Crown probably has power to cede territory without the concurrence of the legislature, yet the modern practice, at all events in time of peace, is to make treaties of cession which shall become operative only on their securing statutory sanction.

There is very little judicial opinion bearing directly on the point. In 1876 an appeal came before the Judicial Committee of the Privy Council from the High Court of Bombay. In deciding a particular case that court had found it necessary to determine whether certain territory had been ceded, and if so, whether it had been validly ceded; and it gave judgment to the effect that it had been the intention of the Crown to effect a cession of territory, but that the intended cession was not valid because it had been made without the authority of Parliament, and the consent of Parliament is always necessary to the cession of territory in time of peace. The Judicial Committee reversed the judgment, on the ground that the Crown had never intended to make a complete cession of the territory in question. It was thus unnecessary to decide the second question raised by the judgment of the Indian Court—the question of whether the Crown has power in time of peace to cede territory without the consent of Parliament; but their lordships observed that they entertained "grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of Bombay."† The case is often quoted in support of the contention that the Crown has absolute authority, independently of Parliament, to cede territory, but it is a very weak foundation on which to base such a view. In the first place, the "grave doubts" expressed by their lordships were not

† Damhodhar Gordhan *v.* Deoram Kanji, (1876), 1 A. C. 352.

necessary for the determination of the case ; they were remarks gratuitously made on a side-issue not falling within the scope of their decision ; and, consequently, they possess no binding authority. In the second place, the land in question was situated in India, and, as Sir William Anson has pointed out,* Indian territory occupies a somewhat peculiar position in this respect.

The case does not carry the matter far ; and, in the absence of other decisions on the point, it is necessary to draw conclusions from state practice. Even here the older view seems to have been that the prerogative was unfettered, but in modern times there have been two remarkable instances of treaties which had been concluded by the ministers of the Crown being submitted for statutory sanction to Parliament. The cession of Heligoland to Germany in 1890 was made conditional on the approval of Parliament,† and when the Bill embodying that approval was before the House of Commons Mr. Balfour stated that eminent legal authorities consulted on the matter had maintained the necessity for Parliamentary assent. The same course was followed in 1904, when the Anglo-French convention involved certain cessions of territory to France ; and Sir William Anson ‡ feels "drawn to this conclusion, that apart from precedents relating to Indian territory it has of recent years been thought desirable, if not necessary, that the consent of Parliament should be given to the cession of territory in time of peace."§

From a practical point of view, therefore, it may be stated

* *Law and Custom of the Constitution*, vol. ii, pt. ii, p. 106.

† *See* the Anglo-German Agreement Act, 1890, 53 and 54 Vict., c. 32.

‡ *Law and Custom of the Constitution*, vol. ii, pt. ii, p. 107.

§ Such consent is probably not necessary if the treaty is made to put an end to, or to prevent, war on public grounds and for the public safety. *See* Walker *v.* Baird (1892), A. C. 492.

that, in connection with the matters discussed in the foregoing pages, the treaty-making prerogative of the Crown is imperfect, and that, (to regard the matter from the point of view of the Dominions), a treaty which involved the cession of territory within the area of a Dominion or which imposed taxation upon or interfered with the private rights of persons resident within the Dominion could not come into operation without statutory authority.

From a purely legal point of view it would be possible for such authority to be given by the Parliament at Westminster, for the great feature which distinguishes the legislative power of the Imperial Parliament from that of a Dominion Parliament lies in the fact that, while the power of the Imperial Parliament is unrestricted, the power of a Dominion Parliament is confined within the territorial limits of the Dominion itself.* But it is not conceivable that the Imperial Parliament could ever contemplate the use of its legally unlimited powers for bringing into operation within a Dominion any treaty of the kind now under consideration. Since the grant of responsible government the consistent policy has been to allow the Dominions an ever-increasing control over their own internal concerns, and that control, so far as it is possible to draw a line between matters of internal and matters of external interest, may be said to be at the present time well-nigh complete. The rule to-day is that the Imperial Parliament will not use its legislative power to interfere in the internal and local affairs of any Dominion unless the government of that Dominion has previously been consulted and has consented ; and Parliament now acts, when it acts at all in Dominion matters, usually for the purpose of supplementing Dominion legislative powers and giving more com-

* Compare R. *v* Earl Russell (1901), A. C. 446, and Macleod *v.* A.-G. for New South Wales (1891), A. C. 455. *See* also Dicey: *Law of the Constitution*, chaps. i and ii.

plete effect to local desires than could otherwise be obtained.* Hence, under modern practice, a treaty providing for the cession of territory within the area of, or imposing taxation upon or interfering with the private rights of persons in, a Dominion could never come into operation without the consent of the inhabitants, expressed through the Dominion legislature.

§ 2. DOMINION CONTROL OVER TREATY-MAKING

Other treaties, however, require no legislative sanction,† and the control of the Dominions over their own foreign affairs would be insignificant indeed if it were to be confined to the power of refusing statutory confirmation to a few very exceptional treaties. Constitutional custom, however, has mitigated the harshness of the strict legal rule in other directions.

Thus the original practice with regard to commerical treaties was to make them binding on all Dominions of the Crown ; but in 1877 it was agreed that commercial treaties should not be made applicable automatically to the colonies enjoying responsible government, but an option should be given to such colonies, allowing them to decide, within a period usually fixed at two years, whether or not they would adhere to the provisions of any particular treaty ; and the principle thus agreed upon has had operation since it was first applied in 1882 in a treaty with Montenegro.‡

* *See*, for instance, 33 and 34 Vict., c. 52, s. 18 ; 44 and 45 Vict., c. 69 ; 47 and 48 Vict., c. 31 ; 58 and 59 Vict., c. 60, ss. 264, 366, 367, 735, 736 ; 61 and 62 Vict., c. 14 ; 1 Edw. VII, c. 29 ; 2 Edw. VII, c. 26 ; 6 Edw. VII, c. 30 ; 7 Edw. VII, c. 7 ; 9 Edw. VII, c. 19 ; &c., &c.

† The Anglo-French Treaty, 1919, was made expressly subject to the approval of Parliament, (*see* 9 and 10 Geo. V, c. 34), although probably such approval was not legally necessary.

‡ Keith : *Responsible Government in the Dominions*, vol. iii, pp. 1108, 1109.

In 1899 the practice was introduced * of providing that the Dominions should have not merely a right of separate adherence, but also a right of separate withdrawal ; and from a very early period the Imperial Government has shown itself anxious to secure by treaty commercial arrangements which the Dominions have deemed advantageous to themselves and to allow colonial ministers well acquainted with the matter to take part in the necessary negotiations. The practice was initiated in 1854, when a Reciprocity Treaty with the United States was negotiated in the interests of Canada, and the Canadian Government were consulted in the fullest possible manner ;† and within recent years there has been a marked development in several directions in the matter of making separate commercial agreements for the benefit of the Dominions.

An important instance occurred in 1907 when Sir Edward Grey issued a dispatch informing the British Ambassador at Paris that the Canadian Government wished to enter into negotiations for closer commercial relations with France. The negotiations were to be left entirely in the hands of the Canadian minister, who would doubtless keep the ambassador informed of their progress ; and if any agreement was reached the ambassador was to sign it jointly with the Canadian negotiator who would receive from the Imperial Government full power for the purpose. In accordance with this arrangement a treaty was negotiated at Paris and was finally approved after being carefully considered by the Imperial Government, the signatures being deferred until that consideration had been afforded.‡

The precedent thus set has been followed on several other occasions, but in 1910 a new step, not wholly satisfactory, was

* *See* Keith: *Responsible Government in the Dominions*, vol. iii, pp. 1108, 1109.

† *Ibid.*, pp. 1111, 1112.

‡ *Ibid.*, pp. 1117, 1118 ; *see* also Keith : *Imperial Unity and the Dominions*, pp. 269, 270.

taken. The Government of the United States made proposals through the British Embassy for further discussions on the subject of reciprocal trade between the United States and Canada. Two Canadian ministers carried on direct discussions with the United States Government, and an agreement was reached by which, without any formal treaty being entered into, alterations should be made by legislation on both sides.* The result was that so far as Canada and the United States were concerned all the ends which could have been attained by treaty were secured; but, since the formalities of treaty-making had not been observed, the Imperial Government had no adequate opportunity of scrutinizing the arrangement. The Canadian negotiators had been in fairly frequent communication with the British Ambassador, but such communications had proved insufficient for the purpose, and the result was that imperial interests were prejudiced.

The instance affords a remarkably good illustration of the great defect in the constitutional machinery of the British Empire. The negotiations had been conducted by men concerning whose devotion to the interests of the Empire there could be not a shadow of doubt, but whose knowledge was, for the most part, of Canadian affairs, so that they were not sufficiently aware what imperial interests were involved. It is useless to say simply, as some people have said, that the Dominions ought not to enter into arrangements beyond the scrutiny of the Imperial Government. The Dominions are rapidly attaining their full stature, and, step by step with the development of responsible government, they are extending their control over all that concerns them. It is idle to expect that they will be prepared for ever to submit their arrangements for the approval of the Imperial Government as that Government has hitherto been constituted. In the past that Govern-

* Keith: *Imperial Unity and the Dominions*, pp. 271–74.

ment has not been fully representative in any true sense of the word; it has been, in fact, a British Government pure and simple, and unless and until it can be reinforced and made a more representative body by the inclusion in it of Dominion representatives when affairs of Empire are discussed it cannot be hoped that the Dominions will for ever submit to its veto.

But to return to the main object of this chapter and to outline the extent to which the Dominions have acquired control over their own foreign affairs, it is necessary to record a highly important innovation that was recently introduced. For some time it had been the practice for the Dominions to send representatives to international conferences at which were discussed many and various topics, but which were not calculated to produce any direct political results, so that no question of treaty-making arose. When, on the other hand, an international agreement was contemplated the Dominions were either not represented at all or else Dominion statesmen were included as advisors in the British representation.

In 1911, however, a change was introduced on the occasion of the international conference summoned by the United States Government for the revision of the International Convention respecting the protection of industrial property, and Canada, through the medium of the British Embassy at Washington and of the Governor-General of the Dominion, was specially invited to send representatives. The conference resulted in a convention;* but the Canadian delegates did not see their way to attach the consent of their Dominion to it, so that the question of their status and position never arose.

* "Convention" means for all practical purposes the same as "treaty." International agreements which deal with the larger political and commerical interests of states are usually called "treaties"; those which are of minor importance or which deal with more specific subjects usually receive the name of "conventions."

But the precedent had been set, and it was not long before such matters were fully defined. In the following year an international radio-telegraphic conference was convened in London, and the four great Dominions were represented at it. Each of the Dominion representatives received under the Great Seal of the United Kingdom full powers which differed only from those granted to the British representatives in being qualified by the addition of the words " on behalf of the Dominion (of Canada, or Australia, or New Zealand, or South Africa, as the case might be)," and the precedent thus set was followed in the case of the international conference on the safety of life at sea, which was held in London in December 1913 and January 1914.*

The change is one of the utmost importance. Representatives of the Dominions no longer occupy the position of plenipotentiaries of the United Kingdom, and in consequence they are no longer bound, as formerly they were, to cast their votes in favour of the view which is supported by the other British representatives. They are free to vote in whatever way they deem to be most acceptable to their own particular governments, and their new position marks a distinct advance in the extension of Dominion autonomy. True it is that the ratification of any treaty so made rests with the Crown acting on the advice of the British Government ; but if only that Government can be converted for the purpose of dealing with such matters—and recent events have proved that it can—into a body truly representative of all the self-governing parts of the Empire, then, so far as commercial treaties are concerned, the Dominions will be able to exercise a very effective control over their external affairs and, at the same time, to enjoy the benefits of empire.

* For more detailed information on this point *see* Keith : *Imperial Unity and the Dominions*, pp. 277–79.

The same remark could not, however, be applied until very recently to political treaties. Political treaties were never subject to the same control on the part of the Dominions as commercial treaties, and there has not, in purely political matters, been any attempt to secure to the Dominions separate powers of adherence or withdrawal. Indeed, it is difficult to see how such separate powers could be put into practice. In commercial matters their use is admittedly feasible, for questions of commerce depend upon locality, but in many political matters a united Empire must necessarily present a united front and possess a common policy.

In the framing of that policy, however, the Dominions might very well be given a larger control than hitherto has been their share. Some steps have been taken ; and since the establishment of responsible government there has been a tendency to deal with important questions affecting the Dominions in conjunction with Dominion governments. Space forbids any attempt to deal with the earlier instances ; suffice it to say that several examples occurred at a fairly early period of Dominion representatives being numbered among the British delegates for the negotiation of political treaties, and in 1908 a very important step in emphasizing the independent character of the Dominions was taken. In that year an arbitration treaty was concluded between the United Kingdom and the United States, and the British Government reserved to itself the right, before accepting an agreement for reference to arbitration of any matter affecting the interests of a Dominion, to obtain the concurrence to the agreement of that Dominion. The precedent was followed in 1910 in the case of the Pecuniary Claims Treaty ; and it was extended in 1914,* when, in the case of a treaty providing for the establishment of a Peace Commission to consider certain points in dispute between the

* *See* Parl. Papers (Cd. 7963).

governments of the United States and the United Kingdom, the governments of the Dominions were consulted before the treaty was concluded, and provision was also made that in any dispute affecting the interests of a Dominion, the British membership of the Commission should be changed so as to admit of the presence of a representative of the Dominion concerned. The precedent has not, however, been followed in any other arbitration treaty ; but the practice of consulting the Dominions and obtaining their previous consent has been applied with distinct advantage in several instances.*

When all due allowance has been made, however, for such steps as have been taken, it cannot be said that they have admitted the Dominions, to anything like an adequate extent, to a voice in the framing of political treaties which affect their interests, for there yet remain treaties, dealing with large and important topics, concerning which it has not been thought necessary to consult Dominion governments. There are, for instance, those wide and far-reaching treaties of the type of the Hague Conventions. To those who have appreciated the full significance of the control which the Dominions have acquired over commercial treaties it will come as a shock to learn that their governments were not consulted over such momentous matters as the Hague Conventions of 1899 and 1907 and the famous Declaration of London.†

Nor are the Dominions content with their position in this respect. At the Imperial Conference of 1911 ‡ a resolution was carried regretting " that the Dominions were not consulted

* *See* Keith : *Imperial Unity and the Dominions,* p. 288.

† For a list of treaties concerning which the Dominions were not consulted *see* Keith : *Responsible Government in the Dominions,* vol. iii, pp. 1111, 1112.

‡ See *Minutes of Proceedings of the Imperial Conference,* 1911, p. 97, *et seq.*

prior to the acceptance by the British delegates of the terms of the Declaration of London" ; and the delegates expressed clearly and unambiguously their objections to the position. "Since we are now a family of nations," said Mr. Fisher, moving the resolution, "has not the time arrived for the over-sea Dominions to be informed, and wherever possible consulted, as to the best means of promoting the interests of all concerned, when the Mother Country has decided to open negotiations with foreign powers in regard to matters which involve the interests of the Dominions? . . . We do think, and we shall press upon you . . . that it would be advisable for you wherever possible, at any rate in important matters which concern us, such as this, to take us into your confidence prior to committing us. . . . It is not sufficient for you even to make a good treaty affecting us and then to tell us after it has been made."

The protest succeeded, and a pledge was given by Sir Edward Grey, on behalf of the British Government, that for the future the Dominions would, wherever possible, be consulted over negotiations affecting their interests. The pledge can hardly be said to have erred on the side of generosity. Indeed, one must hesitate before recognizing it as any approach to a simple measure of justice ; and it is very difficult to imagine any weighty argument which could be adduced as to why the Dominions should not enjoy a separate representation in such matters. Precedent for that representation has already been established, not merely in purely commercial matters, but also in a matter so closely related to the question of imperial defence as radio-telegraphy ; and that precedent was followed recently in the case of the Treaty of Peace.

The results must be lasting and far-reaching. The Treaty of Peace may or may not be sound in the policy which dictated it ; it may or may not attain the objects which those who

framed it had in view ; from a purely international point of view its worth may even prove to be little more than that of the paper on which it is written ; but, so far as the internal organization of the British Empire is concerned, its results must be permanent and important. The Dominions have signed the Peace Treaty as separate nations ; and, as separate nations, they have received mandates from, and have taken their places in, the League.* The accepted constitutional machinery of the Empire has become obsolete. The Dominions have acquired an international status of their own, and " they now stand beside the United Kingdom as equal partners in the dignities and the responsibilities of the British Commonwealth."† Their partnership must be recognized to the full extent, or the Empire must dissolve and its component parts go each upon an independent path of its own. There is no other solution. Facts have moved, and are still rapidly moving, away from the accepted legal theory and towards the full realization of responsible government. Canada has now the admitted right to appoint an ambassador plenipotentiary at Washington. By precedent the other Dominions have also a right to appoint their own representatives in whatever capitals they may find to be convenient, and Mr. Hughes has announced that Australia intends to exercise the right and to appoint an ambassador to the United States. That is the logical, the inevitable, consequence of the status of the Dominions under the Peace Treaty and their present position with regard to the Empire and to the world. Yet the old legal theory remains. In practice it has long been obsolete, and the time for its complete abolition and for the development in its place of a doctrine of voluntary partnership has come.

* This is fully discussed in Professor A. B. Keith's recent work, *War Government of the British Dominions*, ch. vii, viii.

† Mr. Lloyd George at the Imperial Conference, June 20, 1921.

§ 3. FOREIGN AFFAIRS OTHER THAN TREATY

Nothing could bring home the need for change better than a glance at the machinery described in the accepted text-books for the conduct of foreign affairs which do not involve questions of treaty-making; for, if the control of the Dominions over political treaties has been slight, their voice in foreign affairs other than treaty hitherto has been practically non-existent. In particular, according to the accepted legal theory, they have no share in such momentous questions as the making of peace and war. That is a power which belongs to the Crown acting on the advice of the British Ministry alone; and when war has been declared by that authority the whole Empire is at war, and no part can escape from the consequences which flow from a state of hostilities. True it is that the Dominions are under no legal obligation to supply any active aid in the shape of men, money, ships or munitions. But that does not alter the fact that a war declared by the British Government involves serious consequences to the Dominions, renders their ships liable to hostile attack and their property to hostile seizure, and gives to the opposing state all the rights of a belligerent against them. Those are consequences which they cannot escape so long as they remain within the Empire, consequences in which they may be involved by the will of a British Ministry over whom they have no control.

The position is anomalous, and, accepted legal theory though it is, it does not accord with the facts which recent events have produced. The Treaty of Peace gave to the Dominions an international status of their own, and that status has been recognized by the Anglo-French Treaty of June 28, 1919, regarding the defence of France. The Dominions were not made parties to that Treaty, and it was expressly provided that the Treaty should impose no obligation on any of them unless

and until it has been approved by their Parliaments. On the exact legal result of such a provision it is not possible to dogmatize. Whether, as some have argued, the Treaty impliedly negatives the old rule that a declaration of war by the United Kingdom involves the whole Empire in hostilities, or whether (as seems the more probable interpretation) the provision was inserted in order to indicate to France the accepted constitutional position that any material assistance by the Dominions must be voluntarily offered—is a question which is open to some discussion. One thing, however, is certain ; the Treaty would afford the Dominions the basis for an argument that, in a war of which they disapproved, they were entitled to adopt a position of neutrality. If such a claim were made by the Dominions, then, doubtful though its legal validity possibly might be, it would have to be admitted in practice. There is only one solution ; the Empire must resolve itself into a partnership of equal nations, and the partners must frame their foreign policy in concert. A legal theory which is manifestly out of accord with admitted facts is an impossible instrument of government, for it is fact, not obsolete theory, which determines the political life of practical peoples.

§ 4. THE BURDEN OF DEFENCE

The position which accepted legal theory assigns to the Dominions is unjust ; and, moreover, there is nothing in it of convenience which might render it more tolerable to the British Government. On the contrary, it involves no small measure of injustice to the Mother Country ; for the necessary corollary to the exclusion of the Dominions from the decision of questions of peace and war is the absence of any obligation on their part to contribute rateably to the common defence of the Empire.

That is a situation which the government of the Mother

Country has recognized on more occasions than one. "We hope to have their help, but still they are quite right to look after their own interests, in the full security that so far as the British Government can be of use to them in their defence in time of need they may depend in any circumstances on our giving that aid with the greatest joy and without any sort of drawback whatever."*

But, however much the Mother Country may have expressed her acceptance of the position, it cannot be denied that it is a position wholly unfitted to the modern circumstances of the Empire. It suits neither the Dominions nor the United Kingdom. It is unsatisfactory to the Dominions because it precludes them from a voice in determining questions which vitally concern them and places them in a situation which cannot easily be reconciled with the young and ardent sentiments of vigorous communities. It is unsatisfactory to the United Kingdom because it throws upon her the greater part of the cost of the defence of the Empire, a burden which it is becoming increasingly obvious that she cannot permanently bear.

Indeed, for some time before the outbreak of war circumstances had been moving more and more away from the position which a logical application of the accepted theory would have produced. When once responsible government had been established, the fact gradually became manifest that the old system, under which defence against internal disorders was undertaken by troops from the Mother Country, could not be continued; for, so long as the colonies were to enjoy any measure of responsible government, it was obvious that their governments must have the direction of all troops within their borders. But if these troops were British troops the situation was one to which the home authorities could not consent, and so the

* Lord Tweedmouth at the Colonial Conference, 1907. Parl. Papers (Cd. 3523), p. 149.

doctrine was evolved that colonies in the enjoyment of responsible government ought to meet the cost of, and ultimately to make the necessary arrangements for, their own internal defence.

That was a doctrine consonant in many respects to the awakening national consciousness of the colonies and to their consequent desire for self-assistance. Its evolution was slow, however, and it was not until 1862 that it was definitely formulated; and, even then, it was put into operation very gradually. At first the practice was to allow the Dominions the use of British troops on condition that they were prepared to meet the expense of their upkeep. Next, the use of such troops was confined to cases of direct imperial concern, as distinct from local interest, with, however, the additional understanding that, should any part of the Dominions be attacked, the whole forces of the Empire would, if necessary, be used to repel the aggression. But the use of the imperial troops within a Dominion was found to be productive of much friction between the British Government and the Dominion authorities, with the result that the imperial troops were withdrawn altogether from the Dominions, and the Dominions established land forces of their own.*

It is important, however, to bear in mind with regard to those forces that they were established for the prevention of internal disorder and for the purpose of purely local defence, and, although the Army Act † makes provision for their co-operation with imperial forces outside the Dominion, they were not, before the outbreak of war, kept at a strength proportionate to the ability of the Dominions to contribute to the burden of imperial defence. Nor could any other condition of affairs reasonably be expected. So long as the Government of the

* *See* Keith: *Responsible Government in the Dominions*, vol. iii, p. 148, *et seq.*

† Section 177.

United Kingdom assumes to itself the right to decide important questions of foreign policy without seeking the advice of the Dominions it must also shoulder the corresponding burden and make provision for the defence of all parts of the Empire in any complications to which that policy may lead. The inhabitants of the Dominions may volunteer for imperial service, but the whole of their obligation, both political and legal, is domestic.

The needs of imperial service must be met by the so-called Imperial Government, composed of ministers responsible to the British Parliament ; and hitherto what has been regarded as the best means of meeting those needs has been the efficiency of the British Navy. But here again circumstances have forced the practice away from a strictly logical application of the accepted theory, although the movement has not gone by any means so far as in military matters. So long as the Dominions were content to leave the control of all exter nalrelations to the United Kingdom the matter was simple enough. But with the exercise of responsible government their interests widened, and they began to have ideas concerning their own defence, which did not always tally with those of the British Government, and they asked for more protection than Great Britain could always afford them. The inevitable consequence was that the Dominions were asked to make some contribution towards their own local defence.

Into the early history of that movement and the legal difficulties which resulted from the fact that colonial legislation could not have extra-territorial effect it is not necessary to enter in this discussion ; it will suffice for the present purpose to indicate the salient facts.

In 1865 * power was given to the colonies to maintain ships of war and naval forces, including volunteers who were to

* 28 and 29 Vict., c. 14, ss. 3–10.

be bound to serve in the Royal Navy if and when required, and to pass legislation, if they so desired, for regulating the government of the men when within the colonial limits; but if the men went outside those limits they were automatically to fall under the regulations for the time being in force with regard to the Royal Navy. Under these provisions many ships were provided by the Australian colonies, and the immediate cause of those contributions were the discussions on the question of defence which took place at the Colonial Conferences of 1887 and 1897. Those discussions arose principally out of the serious international situation which had existed in 1885, when Great Britain and Russia had been on the brink of war as a result of disputes concerning the Indian frontier. War was avoided, but the incident left its lesson. It was known that Russia had contemplated stationing large ships in the Pacific, and although the general superiority of the British Navy was fully acknowledged, the special liability to attack of the ports of Australia and New Zealand was disquieting to the inhabitants of those countries, and they asked the British Government to make further provision for their protection. But the British Government had to hold itself responsible to the British electors, and it was quite certain that voters in the United Kingdom would not make so large an estimate of the force necessary for Australasian defence as would the inhabitants of Australia and New Zealand themselves. The only course left to the British authorities was to ask the colonial governments to contribute to the cost of the proposed increased measures of defence. That contribution, as has already been pointed out, was made; but it was greatly increased when the power of the Dominions was recognized to maintain naval forces which did not pass under the regulations in operation for the Royal Navy but remained subject to Dominion control when they passed beyond the colonial territorial limits.

In the year 1900 the six Australian colonies were joined under federal government, and the Commonwealth of Australia Constitution Act * conferred upon the Commonwealth legislature power to make statutes concerning naval defence. The interpretation placed upon this provision was that it gave a power of extra-territorial legislation sufficient at least for a naval force engaged in repelling an enemy from the coasts of Australia. Hence, in 1903, naval defence in Australia was completely reorganized on this assumption, and further important legislation was passed in 1907 with the result that an Australian Navy was established. And this precedent was followed in 1910, when provision was made for the creation, within a period of nine years, of a Canadian Navy. In both cases it is clearly laid down in the Canadian and Australian legislation that the fleets are to remain under the control of their own governments.†

Nor could any other provision be looked for. From a strategical point of view it may no doubt be convenient that all the naval forces of the Empire should be under one control, but the reason for the retention of Dominion navies under Dominion control is not, as one gallant gentleman in the fulness of his zeal for technical efficiency has seen fit to suggest, so that "the citizen might be able to see his own ships, and flatter himself that they are guarding his shores." It is something far different from that. It is that the Dominions enjoy responsible government and are ardently attached to its principle. As Mr. Curtis has pointed out,‡ to place the Australian or the Canadian Navy permanently under any other control would be a retrogressive step, a reversion from the doctrine of responsible govern-

* 63 and 64 Vict., c. 12, s. 5.

† *See* Keith: *Responsible Government in the Dominions*, vol. iii, p. 1295.

‡ *The Problem of the Commonwealth*, p. 86.

ment to that of representative government. The very essence of responsible government in the colonies is that the Dominion executive should be responsible to the Dominion legislature, and ultimately to the electorate by which the members of that legislature are chosen ; and any arrangement by which a Dominion is to provide a navy to be managed by authorities over whom it has not a complete control is a direct violation of the one principle which has made the Dominions great.

Nor does Dominion control indicate any desire to sever the imperial connection, as some timid people seem to imagine. That suggestion is fully disposed of by the eagerness of the people of the Dominions to call their navies " His Majesty's "— " His Majesty's Canadian Navy " and " His Majesty's Australian Navy "; by the fact that the white ensign is flown at the stern of the Dominion vessels of war " as the symbol of the authority of the Crown ";* and by the provisions in Dominion legislation which expressly contemplate the placing of the Canadian and Australian Navies at the disposal of the British Government for general service with the British Navy.†

But, as with the Dominion armies, so also with the Dominion navies ; they are primarily intended for the purpose of purely local defence. The principle still prevails that the United Kingdom is responsible for the defence of the Empire as a whole ; and before the outbreak of war none of the Dominions contributed to the cost of imperial defence a sum proportionate to their population or to their ability to contribute. While expenditure for defence in the United Kingdom for the year 1913–14 amounted, roughly, to nearly thirty-two shillings per head of the population, the corresponding expenditure in Australia was about eighteen shillings, in New Zealand about

* Curtis : *The Problem of the Commonwealth*, p. 88.

† Keith : *Responsible Government in the Dominions*, vol. iii, p. 1295.

fourteen shillings, in Canada about seven shillings and sixpence, and in South Africa about four shillings and sixpence.*

Nor do these figures in any way reflect on the readiness of the Dominions to undertake the burdens of empire; for imperial defence was, to a large extent, regarded as a matter lying outside their scope. So long as the British Government chose to keep within its own hands the exclusive control of the greater part of the foreign affairs of the Empire, it had necessarily to undertake the greater part of the defence of the Empire; for foreign affairs and defence are matters which are intimately and inevitably interwoven. The Dominions were under no political or legal obligation to contribute. This fact was fully recognized by the British Government; and so absolute was the rule that no request for men or money from the Dominions was made at the outbreak of the recent war, and the action of the British Government throughout was confined to advising them how best they could afford the aid which they so eagerly desired to render to the Empire.

The rule, however, is fundamentally unsound; for it rests on the assumption, which the history of responsible government in the Dominions has so often shown to be false, that it is possible to draw a line between affairs of local and affairs of imperial concern. It is no longer possible to maintain that foreign affairs and imperial defence are matters which do not concern Dominion governments. The Dominions are parts of the British Empire, and when the government of the United Kingdom sees fit to declare war all parts of the Empire are involved in its consequences; and the day has now gone for ever when the people of the Dominions were content to leave their defence against those consequences in British hands.

The Dominions are now inhabited by nations, and a young

* *See* this worked in Curtis: *The Problem of the Commonwealth*, pp. 166, 167; and Worsfold: *The Empire on the Anvil*, pp. 142–145.

and vigorous nationality can never be content with the position of a mere spectator while affairs which vitally concern it are afoot. On the contrary, it strains to play its full part to the very limit of its resources. That is why Dominion troops fought beside their British comrades for four-and-a-half years, and it is why the hitherto accepted relations between the United Kingdom and the Dominions cannot continue. Once and for all it has been proved that, despite the absence of any legal or political obligation to that end, the Dominions must take their full share in any war in which the British Empire is involved. That is a course to which their national consciousness impels them, and this national consciousness will also demand, as a correlative right, that Dominion voices should be adequately heard in the determination of questions of foreign policy, with which problems of naval and military defence are so intimately interwoven.

Chapter IV. *Imperial Federation*

§ 1. THE MEANING OF FEDERATION

IT is probable that the majority of the members of those vaſt portions of the community which derive their political opinions wholly or mainly from newspaper reading, if asked to ſuggeſt a ſolution to the problem which it has been the object of the foregoing pages to define, would say "by the application to the Empire of the federal principle"; and yet it is equally probable that if the inquirer were to follow up that answer by a queſtion as to the exact meaning of federalism the reply in the majority of cases would be far from accurate; for the word "federalism" in recent years has shown a lamentable but diſtinct tendency to take its place among the many political phraſes and catchwords which are quoted by everyone but underſtood by only a few.

Imperial Federation was once defined by a well-known politician as "ſuch a union of the Mother Country with her colonies as will keep them one ſtate in their relation to other ſtates."* Such a definition, however, is misleading and erroneous. Imperial Federation means ſomething far different from what the words quoted would ſeem to imply; and, far from being a generic term for every arrangement which would keep the Empire a ſingle ſtate in its relations to other ſtates, it means the fuſion of the various parts of the Empire into a ſtate of a certain particular kind.

A Federal State is a particular ſpecies of compound ſtate—that is, a particular ſpecies among that claſs of ſtates which are formed by the permanent union of two or more ſtates. When ſtates unite in ſuch a way they may, to take firſt the ſimpleſt inſtance, produce an incorporate union—a union, that is to ſay,

* For a number of equally erroneous definitions *ſee* Jeſſett: *Bond of Empire*, p. 112, *et ſeq.*

such as that which exists between the component parts of the United Kingdom, where the central or national government has power to act directly, by its own officers and for all purposes, upon every individual citizen. In contrast to this, they may form a system of confederated States, a league of States, or, as it is technically called, a "Staatenbund," such as the German Confederation as it existed prior to 1866, or, to take an earlier and better known example, the confederation of the revolted American colonies as it existed before the creation in 1787 of the present constitution of the United States.

The "Staatenbund" forms the antithesis of the incorporate union; it exists, not as a single whole, but as an aggregate of communities, and will vanish the moment those communities separate themselves from one another, and, while in the incorporate union the central government has power to act upon every one of the citizens and in respect of all matters, the central body in the "Staatenbund" has no power to act upon any of the citizens in respect of any matter, but it deals only with, and acts only upon, the governments of the various communities which make up the aggregate.

Between these two extremes, and partaking somewhat of the nature of each type of organization, lies the Federal State—an attempt to reconcile national unity and power with the maintenance of important "State rights."* The essential feature of the Federal State is that the various communities which are to compose it agree that a distinction should be drawn between common or federal, and local or state, affairs; and that the former should be assigned to the central or federal authority and the latter to the State authorities. In other words, the component States agree to sacrifice their governmental powers over those topics, be they many or few, with regard to which it is advisable, in the common interest, that a single

* Dicey: *Law of the Constitution*, p. 139.

policy should be applied, but to retain and to exercise their powers over all other matters. Thus it comes about that the component ſtates retain to a certain extent their separate identity, while the central or federal government, with regard to those topics which are assigned to it, claims the obedience of each citizen and, through its courts and executive officers, acts directly upon him.

Such ſtates only as exhibit this feature are properly described as federal ("bundeſtaaten"); and it is of the utmoſt importance that this feature should be thoroughly underſtood before the reader proceeds further. Too much confusion has been introduced into discussions of the Empire problem by loose and hazy definitions of federalism; and many people have allowed themselves to be persuaded of the soundness of the federal solution without having completely realized that it means the creation of a wholly new imperial authority which would have the right to pass laws and impose taxes, for imperial purposes, directly upon any and every one of the inhabitants of the Dominions.

Perhaps, for purposes of illuſtration, the beſt scheme for the application of the federal principle to the British Empire is that outlined by Mr. Lionel Curtis in his recent book, *The Problem of the Commonwealth.* He there advocates the formation of a wholly new imperial cabinet,* conſiſting of the heads of all those departments of government which experience has shown to be necessary and inseparable in the conduct of imperial affairs—the Foreign Office, the Admiralty, the War Office, the India Office, and the Colonial Office, together with a Miniſtry of Imperial Finance; and this new cabinet, he says, should be responsible to a new imperial parliament† chosen not by the electorate of the United Kingdom, but by a new

* *The Problem of the Commonwealth,* p. 141, *et seq.*

† *Ibid.*, p. 148, *et seq.*

electorate composed of the inhabitants of the United Kingdom and the inhabitants of the self-governing Dominions as well.

There would thus come into existence a new imperial authority truly representative of the whole Empire, and charged with "those functions which experience has proved to be common to all British subjects throughout the Commonwealth"*—foreign affairs, defence, the work of the present India Office, Crown Colony administration, and the financial matters necessary to the due discharge of these functions. Such an authority would have power to impose taxation, to such an extent as might be necessary for the due discharge of its allotted functions, and to enforce its acts in such matters against the individual inhabitants of all parts of the Empire. The burden of taxation between rich man and poor man and the control of the social effects of taxation within their own areas, together with the local collection of the taxes themselves, might well be left to the local governments; nevertheless, so Mr. Curtis urges, it would be necessary to devise some means which would give to the new imperial authority "the right to distrain on the goods of the individual taxpayer in the last resort."†

To that end he advocates that in case the amount demanded from the inhabitants of any particular Dominion should not be forthcoming it should be lawful for the new imperial government to apply to the Judicial Committee of the Privy Council, (reformed so as to admit of adequate representation by Dominion judges), and for the Court to transfer the control of the Dominion Revenue Department to the Imperial Government until such time as the quota for which the Dominion was liable should have been satisfied, any funds collected over and above

* *The Problem of the Commonwealth*, p. 155, *et seq.*

† *Ibid.*, p. 190.

that amount being returned to the Dominion.* If such measures failed to produce the desired effect, then, he says, "the Court should in the last resort be able to declare the Imperial Parliament authorized to raise the necessary revenues from the taxpayers of the defaulting Dominion by imperial statute, and to take whatever steps were necessary."†

Such, in outline, is a scheme for the federation of the British Empire, as put forward by one of the ablest advocates of that form of solution, and those readers who are not already acquainted with Mr. Curtis's book should lose no time in making themselves familiar with its contents; for if it ever did come to pass that an attempt was made to apply the federal solution to the imperial problem it would be in some such form as the one just outlined—a form which is free from many of the objectionable features which have characterized most of the earlier schemes.

§ 2. THE RIGIDITY OF A FEDERAL CONSTITUTION

It does not seem possible, however, that any scheme of Imperial Federation, however carefully it might be devised, could be applied successfully to the peculiar circumstances of the British Empire; for there are certain defects inherent in the federal type of government which if applied to the British Empire as it exists to-day would be considerably magnified and productive of no small amount of danger.

In the first place, as Professor Dicey has pointed out,‡ federalism implies a "rigid" constitution; and a rigid constitution, with its tendency to impose a barrier to progress, is a burden with which the Empire to-day can ill afford to be

* *The Problem of the Commonwealth*, pp. 191–92.
† *Ibid.*, p. 192. ‡ *Law of the Constitution*, p. 140.

saddled. A rigid constitution, it should be pointed out, is "one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws."* It is distinguished from a "flexible" constitution, that is, a constitution "under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body."† The chief instance of a flexible constitution is that of the United Kingdom. With us there is one process, and only one, for the passing of legislation of all kinds, and an Act for such a far-reaching purpose as the reform or the abolition of the House of Lords would pass through just the same stages—no more and no less—as would be required for the passage of an Act for limiting the number of hours during which shopkeepers might keep open their premises or an Act with any other equally trivial object. Such constitutions are not numerous in the modern world; for the political conditions of most countries have led, at one time or another, to conscious attempts at constitution-making and to endeavours to attain constitutional stability by the enactment of statutory safeguards against ill-considered amendment.

Rigid constitutions, for that reason, are very popular in both Europe and America. Thus, in the United States legislative power for ordinary purposes is vested in the President and a Congress consisting of two Houses, the Senate and the House of Representatives; and for ordinary legislation a bare majority in each House, followed by the assent of the President, is sufficient. But if a change in the constitution be desired it is necessary to observe a very different procedure. According to the method invariably employed, an amendment of the constitution can only be proposed by Congress with the

* Dicey: *Law of the Constitution*, p. 123.

† *Ibid.*, p. 122.

approval of two-thirds of the members of both Houses; and, when proposed in this way, the amendment must be ratified by at least three-fourths of the state legislatures before it can come into operation.

It would be possible to give numerous further examples, but the one cited will suffice to indicate the nature of a rigid constitution. For the present the important point to be noticed is that such a constitution is inseparable from federalism. A Federal State derives its existence from the constitution; it comes into existence as the result of an agreement between the various communities which are to compose it, and the terms of that agreement form the constitution; and it follows that every person or body exercising executive, legislative, or judicial power, whether on behalf of the whole nation or on behalf of the individual states, must derive his or its authority from the constitution.

The constitution is thus a matter of no inconsiderable importance. It cannot be left, as large portions of the British Constitution are quite conveniently left, in the form of unwritten understandings. On the contrary, it must be set down in writing as clearly and as unambiguously as possible in order that there may be no more misunderstanding than cannot be avoided concerning its terms; and, above all, in order that the important division between federal and local affairs may not be left open to easy encroachments, the constitution must be removed from the ordinary legislative method of change. In other words, a federal constitution must necessarily be rigid. "If Congress could legally change the constitution, New York and Massachusetts would have no legal guarantee for the amount of independence reserved to them under the constitution, and would be as subject to the Sovereign power of Congress as is Scotland to the Sovereignty of Parliament; the Union would cease to be a Federal State and would become a unitarian

republic. If, on the other hand, the legislature of South Carolina could of its own will amend the constitution, the anthority of the central government would (from a legal point of view) be illusory ; the United States would sink from a nation into a collection of independent countries united by the bond of a more or less permanent alliance."*

It is this rigidity, inherent to a greater or less extent in every federal constitution, which gives to the system one of its chief defects, the defect of conservatism. The mere fact that a principle is contained in the constitution produces for it, in the minds of many people, a reverence almost superstitious, and gives to it an immutable position not to be interfered with except in cases of extreme necessity. Nor is such an attitude in any sense unnatural. The whole machinery of government in a Federal State is created by the constitution, and to alter the constitution savours not a little of an attempt to tamper with the very foundations on which the state is based.

But the position, although natural, is attended with inconvenience, as the history of almost any federation will show. " The principle that legislation ought not to impair the obligation of contracts has governed the whole course of American opinion. Of the conservative effect of such a maxim when forming an article of the constitution we may form some measure by the following reflection. If any principle of the like kind had been recognized in England as legally binding on the Courts the Irish Land Act would have been unconstitutional and void ; the Irish Church Act (1869) would, in great part at least, have been from a legal point of view so much waste paper, and there would have been great difficulty in legislating in the way in which the English Parliament has legislated for the reform of the universities. One maxim only among those embodied in the constitution of the United States

* Dicey : *Law of the Constitution*, p. 144.

would, that is to say, have been sufficient, if adopted in England, to have arrested the most vigorous efforts of recent Parliamentary legislation."*

Such instances are apt to make the lover of progress pause before advocating the application to the British Empire of a principle fraught with such defects. But the matter does not end there. In the history of federalism there have been instances when, despite the excessive reverence with which the constitution was regarded, the need for material alteration in its terms has been felt by leading statesmen, even by whole parties; and yet that alteration could not be accomplished because the majority necessary to alter the constitution could not be obtained. Nor is the reason far to seek. Wherever a party system exists—and, human nature being what it is, it is difficult to perceive how the system of political parties can be avoided—every proposed change in the constitution, however necessary it may be, is thought to be more advantageous to one party than to another; and so the matter becomes a party question, marked by all the venom and all the useless recrimination of party warfare; and unless the party proposing the amendment happens to be so strong that the necessary majority for an alteration of the constitution is assured to it the amendment passes into law in a compromised and truncated form, a mere shadow of the change which was originally proposed, or else, as more often happens, it fails completely, and business has to be conducted under the former system which the needs of the times have outgrown.

The constitutional history of the United States is full of illustrations of this all-too-serious defect in federal institutions. "There have been long and fierce controversies over the construction of several points in the constitution, over the right of Congress to spend money on internal improvements, to

* Dicey: *Law of the Constitution*, p. 170.

charter a national bank, to impose a protective tariff, above all, over the treatment of slavery in the territories. But the method of amendment was not applied to any of these questions because no general agreement could be reached upon them, or, indeed, upon any but secondary matters. So the struggle over the interpretation of a document which it was found impossible to amend passed from the law courts to the battlefield."*

Nor is the trouble confined to America, as many of the advocates of Imperial Federation would have us believe. We need look no further than the federal systems within our own Empire to find it illustrated. In Canada, for instance, the need has long been felt for legislation on the subject of the pollution of watercourses; and that legislation has been delayed because of the difficulty of deciding whether, under the constitution as it now stands, the Parliament of the Dominion has the power to pass it,† or of securing such a general agreement as would justify an application to the Imperial Parliament for an amendment conferring the specific right.

No doubt the advocate of federalism will answer these remarks by the statement that extreme rigidity is not an essential attribute of all federal constitutions,‡ that although it is necessary that the constitution should be removed from the ordinary legislative method of change yet its removal need not be to so great a distance as to render the machinery of constitutional amendment inconveniently difficult to put into operation. Mr. Curtis § even goes so far as to assert that it would be possible to enact a constitution for the British Empire which would not in the least degree be rigid; and he supports his

* Bryce: *American Commonwealth*, vol. i, p. 372.

† Keith: *Imperial Unity and the Dominions*, pp. 498–99.

‡ Muir: "The Making of an Imperial Parliament," *History*, January 1917. Mr. Muir is *not* an advocate of the federal solution.

§ *The Problem of the Commonwealth*, app. to chap. xxi.

view by a reference to the constitution of the Union of South Africa.

It is impossible, however, after even the most superficial examination of the facts of the case, to assent to a statement couched in so extreme a form. The Union of South Africa is not in any sense a federal state. The Union Parliament may deprive the Provincial Councils of any of their powers ; and to suggest for a moment that the British Dominions would consent to the enactment of an imperial constitution creating a new Imperial Parliament having the legal right to encroach, to whatever extent it should deem necessary, on their local autonomy is to put forward a proposition both impossible and absurd. No doubt the Imperial (*i.e.* British) Parliament, as it exists to-day, possesses such a legal power ; but the exercise of that power is limited by those constitutional customs which, as the British constitution now stands, play a far more important part in practice than do positive rules of law to supplying the defects of Dominion autonomy, and giving to Dominion legislation a wider operation than that with which the local parliaments can endow it. But those restrictions could not remain in a customary form if the constitutional relations of the various parts of the Empire were revised on a statutory basis. On the contrary, the Dominions would insist on adequate statutory safeguards for the protection of their autonomy ; and once that claim was admitted a rigid constitution would be the inevitable consequence.

To the other statement, that although rigidity is necessary to a federal constitution it need not be extreme rigidity, it is possible to give some degree of assent. Indeed, in pure theory, the machinery for amending the constitution might differ so slightly from the ordinary legislative machinery that the constitution might be almost on the very borders of flexibility ; but such a position could not be attained, or by any means nearly

attained, in the British Empire to-day. The degree of rigidity of any federal constitution depends upon the strength of the safeguards which the component states deem necessary for the protection of their local rights, and if one thing is evident it is that if the federal principle could conceivably be applied to the present British Empire it would be in a form in which Dominion autonomy was protected by the strongest possible safeguards.

The fact is too often omitted or ignored that the inhabitants of the United Kingdom and of the Dominions form, not one nation, but several. If any reader be disposed to doubt this assertion let him take up Mr. Richard Jebb's *Studies in Colonial Nationalism*, and should he lay down that work with the impression that in some parts the case is overstated he will be unable, at least, to escape the conviction that there does exist in each Dominion a separate national sentiment, more strongly marked, perhaps, in some instances than in others, but in all cases clearly and unmistakably present. It is this national sentiment, fostered by responsible government and centring round Dominion autonomy, which, in any formally enacted constitution for the British Empire, would demand strong safeguards—which, in other words, would produce a constitution distinctly rigid.

Therein lies one of the great dangers to the Empire of any attempted application of the federal principle. States are organisms which must adapt themselves to their environment, and their success depends on the ease with which that adaptation can be made. Everything points to the fact that the circumstances with which the Empire is surrounded are in a fluid state, that the years before us are years of constant change; and the position will be tragic indeed if the British Empire is to be prevented by the cumbersome machinery of a very rigid constitution from making changes when changes become due.

The history of rigid constitutions points with no uncertain

hand to the dangers involved in such a position. There are occasions when there is an intense popular desire and a strong need for change, while the technicalities necessary for an alteration of the constitution cannot for some reason or other be complied with quickly enough ; and then, since the constitution cannot bend, it must break. The constitutional history of France bears eloquent testimony to the truth of this, for of twelve French constitutions which were expressed to be immutable each lasted for an average of rather less than ten years and many perished by violence.*

§ 3. THE ELASTICITY OF A FLEXIBLE CONSTITUTION

A flexible constitution can, at all events, save us from such catastrophic upheavals. It is not, as some people would have us believe, subject to continual and large changes ; for it is the result of a long course of progressive development, and respect for tradition is sufficient to prevent it from being tampered with to such an extent as to render it unstable. But it has, on the other hand, the great merit of elasticity.† The fact that it is easily alterable enables small changes to be readily made ; it is not necessary to wait until the need has been made manifest for so large a number of changes that the very existence of the constitution is in danger.

It is this constitutional elasticity which explains the fact that English history contains the record of so few violent revolutions. "The history of the English Constitution is the history of continual small changes no single one of which, hardly even the Bill of Rights at the time of the so-called Revolution, or the Reform Act of 1832, made the system look

* Dicey : *Law of the Constitution*, p. 124.

† Bryce : *Studies in History and Jurisprudence*, vol. i, p. 168.

substantially different. Something, no doubt, was cut away and something was added, but the structure as a whole seemed the same, because far more of the old was left than there was added of the new."* Indeed, so long as the ordinary legislative machinery is in working order nothing further is required for the amendment of a flexible constitution; and even legislation is not always necessary in cases where custom plays a large part in the working rules, as it does in the British Constitution and in the customary constitution which is to-day in the process of formation for the discharge of imperial affairs.

Nothing could illustrate in a more striking manner than recent developments in the British cabinet system the ease with which a customary constitution can be moulded to meet the needs of the times. That system, when Mr. Lloyd George succeeded to the premiership, was wholly remodelled to make it a more efficient instrument for the conduct of governmental business in time of war, and some of its most outstanding features were wholly changed.† The cabinet system was revolutionized and the heads of some of the chief departments of government, whose main work had previously been to assist in framing the general policy of the country, were freed to supervise the technical business of their separate departments. A departmental chief before the change had been primarily a politician; he was an administrator only incidentally. After the change his position was reversed, and his chief concern was with the business of his department. It was a remarkable change, and a still more remarkable step was taken shortly afterwards when representatives of the Dominions sat as members of the War Cabinet, and there was, for the time being,

* Bryce: *Studies in History and Jurisprudence*, vol. i, p. 174.

† *See* an article by Sir Sidney Low on "The Cabinet Revolution" in the *Fortnightly Review*, February 1917.

a body truly imperial in its composition.* And these developments, be it noted, required no elaborate and cumbersome machinery to be set in motion as they would have done under a rigid constitution ; they required not a single word of legislation, and without a single word of legislation the cabinet system, when the war was over, was restored to what was in most respects its pre-war position.

No doubt there is somewhat of a disadvantage in the fact that important changes can be accomplished without attracting much attention ; but that disadvantage is more than outweighed by the consideration that had the cabinet system been incorporated in some rigid constitution, depending for its alteration on the bringing into operation of extraordinary technical machinery, it is probable that no change at all would have been accomplished, and we should have had to labour under the disadvantages of a system which, framed for times of peace, failed lamentably to meet the demands which the exigencies of war made upon it.

The incident contains a lesson which should not be missed by those who are seeking to solve the constitutional aspect of the problem of empire. It points to the conclusion that the best policy to adopt is not to enact a formal constitution to which the strong national sentiments of the Dominions must inevitably give an undue rigidity, but to work out by judicious development the details of that empire constitution the rough outlines of which have already been drawn in the form of customs and conventions.

No doubt such a policy will not commend itself to those whose hearts are set on the construction of an elaborate federal system. Spade-work is invariably dull and laborious ; but, unless those who have prepared the foundations have dug through the sand and reached the rock, the structure erected

* This matter is more fully discussed in the next chapter.

on them, however well the architect may have prepared his plans, however well the masons may have done their work, will be useless and will be brought to collapse by the natural and inevitable action of the wind and the weather. "The skill of making and maintaining commonwealths," says Hobbes, "consisteth in certain rules, as doth arithmetique and geometry; not (as tennis-play) in practice only."

§4. THE DIVISION OF POWER IN A FEDERAL STATE

Nor is constitutional rigidity the only defect inherent in federalism which the peculiar circumstances of the British Empire would emphasize. The essential feature which distinguishes a federal system of government from a unitarian system, such as that of the United Kingdom, is its tendency "to limit on every side the action of government and to split up the strength of the state among co-ordinate and independent authorities."* The powers of government are divided between the central government and the governments of the component states, and the powers assigned to any and every authority are strictly limited.

In consequence the various bodies exercising sovereign powers in a federal state are jealous of what they have and keenly alive to anything which savours of encroachment on the part of others. The result is that an elaborate system of checks and balances, designed with the object of preventing any authority from obtaining more than its due proportion of power, grows up, and much of the energy that might otherwise have been used in the discharge of the business of the state is absorbed by friction.

In Switzerland, for instance, the constitution contains an

* Dicey: *Law of the Constitution*, p. 151.

express provision that no two members of the Council, or, to use an English expression, of the Cabinet, are to come from the same canton ;* and a similar rule has grown up in a customary form in the United States, where the President, in seeking the members of his cabinet, is expected to refrain as far as possible from appointing two persons from the same State.† The rule is only one among many which have been formulated for the purpose of giving effect to the mutual jealousies incident to federalism. The serious extent to which it detracts from governmental efficiency is obvious ; and yet it does not seem possible that such a rule, and many others of a like nature, could be avoided if the federal principle were to be adopted as the solution to the empire problem.

The attachment to local autonomy which exists in all the Dominions is so strong that it would most certainly demand such a safeguard, and it is not necessary to look far for an illustration of the evils which would attend it. During the war the Cabinet of this country was able to avail itself of the military knowledge and experience of General Smuts by his attendance at its meetings ; but if the Cabinet had been part of a federal system for the whole Empire, able to take decisions with reference to which it could persuade an imperial federal parliament to pass legislation binding directly on any and every subject in the Dominions, it is quite obvious to anyone who understands the national sentiments of the Dominion peoples that his attendance would then have been impossible. It would have given to the Union of South Africa a proportionately larger representation than the other Dominions, and that, in a body possessing such direct power as a federal executive would enjoy, would not be tolerated by Dominion national sentiment.

* Dicey : *Law of the Constitution*, p. 168.
† Bryce : *American Commonwealth*, vol. i, p. 347.

Nor is it only in the formulation of such rules that the mutual jealousies which mark the federal system of government produce inconvenient results. Disputes frequently arise between the federation and its members, for the policies and the powers of the federal government and of the local authorities not seldom come into conflict, as those acquainted with the recent history of both Canada and Australia are well aware. In the Dominions those disputes are of a purely local character ; they are disputes between parts of the same nation, imbued with the same general national sentiments ; and the mere fact of the physical proximity of the disputants tends to mitigate the seriousness of the consequences of disagreement. But in the case of Imperial Federation there would be no such mitigating influence, and the disputes would be between peoples separated from each other by a world of waters.

It is no answer to such a statement to say, as the federalist doubtless will say, that improvements in the means of communication have abridged distance, that, measured in time, not in mileage, the distance between London and the furthest of the Dominions is to-day no greater than was the distance between Westminster and parts of Scotland at the time of the Union. Science has, indeed, abridged distance, but it has not rendered any more alike the widely different local conditions of the Dominions ; it has not changed the cold of a Canadian winter into the tropical heat of Australia ; it has not in any way diminished the various national sentiments and ideals which have been produced by the fact that each of the Dominions has dealt, and still deals, with its own particular problems in its own particular way. " I cannot," said Burke, " remove the eternal barriers of the Creation ";* and in one sense it may justly be doubted if they ever will be removed.

* *Conciliation with America.*

§ 5. DOMINION NATIONALISM

It would be possible to point to further technical defects inherent in the federal system of government. Sufficient has been said, however, to show that, even could the Dominions be persuaded to consent to its application to the Empire, its operation would be far from perfect. But it is possible to go further and to doubt very much whether, under present circumstances, the Dominions could be brought to give such consent; for the great outstanding characteristic of the British Empire, or, to narrow the issue, of the United Kingdom and the Dominions, is that they contain not one nation, but several.

There do exist to-day in clearly defined forms a Canadian nationality, an Australian nationality, and a New Zealand nationality; and there are signs that the complete growth of such a sentiment in the other Dominions is but a question of time. Nor is evidence lacking to show that the strength of Dominion nationalism is so great that it could not be brought to submit itself to the restraints of any federal scheme for the government of the Empire.

It is only necessary to look to some of the laws passed by the Dominions for striking evidence of the strength of national sentiment. The Dominions, to take only a few among many striking instances, have their own merchant shipping laws; their own currency; their own divorce laws; their own immigration laws, in virtue of which it is lawful for them to exclude British subjects belonging to other parts of the Empire; their own laws as to naturalization and nationality, so that within a Dominion it is possible to regard as British subjects persons who would not be so regarded elsewhere, even in other parts of the Empire.* More striking still is the Canadian Immigration Law of 1910, which "creates a new and strange

* *See*, for instance, Markwald *v.* Att.-Gen., 1920, 1 Ch. 348.

entity, a Canadian citizen who is defined as a person who is domiciled in Canada and who fulfils certain conditions laid down in the Act. If such a person leaves Canada he is entitled to return thither whatever happens ; he cannot be excluded because he may fall under the categories which otherwise are fatal to an immigrant's chance of passing the tests on entrance," * tests, be it remembered, which other British subjects must satisfy. Other Dominions have not embodied that rule in a statutory form ; but in practice they have applied, and still apply, a policy very similar in its operation.

Laws are an expression of the public opinion of a community ; and in such a rule there is very clear evidence of Dominion nationalism. A native-born Canadian regards himself as essentially different from a person born in any other part of the Empire ; he knows that he has much in common with such a person, but he differs in one fundamental respect—he has a different national sentiment ; he is a member of the British Empire, but he is something in addition—he is a Canadian. And so it is in the other Dominions ; and it is this Dominion nationalism which throws an insurmountable barrier across the path of the advocate of Imperial Federation. It is a local sentiment begotten of the system which was inaugurated when Lord Durham's recommendations were carried into effect and the colonists were allowed to decide their own affairs in their own way ; and it has grown in strength with the extension of the sphere of responsible government until to-day the British Empire is what no other empire has ever been, a community of nations ; and the solution to the imperial problem lies not in any attempt to bring the various nations of the Empire within a common system but in the discovery of some means whereby the Dominions can attain to a still more complete nationhood, "a fuller, a richer, and more various life,"

* Keith : *Responsible Government in the Dominions*, vol. iii, p. 1451.

and yet remain, with the Mother Country, parts of a greater whole.

Those means will not be found in any attempted application of the federal principle ; for, however much the advocates of that solution may protest that they do not wish to interfere with Dominion autonomy, the fact remains that a federal system would limit, and limit seriously, the control of the Dominions over their own affairs. Even the mildest form in which that system could possibly be applied, a federation for foreign affairs and defence only, would impose undesirable restrictions upon the Dominions. It would imply, as the ablest among the modern advocates of federation frankly admits, the creation of a new imperial authority which would have the legal right to demand from the Dominions a contribution towards the cost of imperial defence and, should that contribution not be forthcoming, the power to take whatever steps might be necessary for raising the required sum from the taxpayers of the defaulting Dominion. By no ingenuity of argument is it possible to give even a shadow of support to the contention that such a course would not be an interference with Dominion autonomy ; and by no stretch of the imagination is it possible for anyone who realizes the extent to which the people of the Dominions are attached to their local institutions * to bring himself to believe that they could ever be persuaded to submit to it.

Nor would the fact that the Dominions would themselves have representatives on the imperial authority commend it any more to them. Such a view can be taken only by the most superficial ; for if representation were to be based on population —and it is difficult to understand how any other system of

* Note, for instance, the attachment to local autonomy, expressed in the speeches on this subject, of the Dominion delegates at the Imperial War Conference, 1917. Parl. Papers (Cd. 8566), p. 40, *et seq.*

representation could secure acceptance—the Dominions could be completely out-voted by less than one-half of the representatives of the United Kingdom. At the Imperial Conference of 1911 Sir Joseph Ward put forward a proposal for the creation of an Imperial Council of Defence containing representatives from the United Kingdom and from each of the self-governing Dominions, one representative for each 200,000 of their respective white populations ; and he estimated * that the approximate number of representatives would be for the United Kingdom 220, for Canada 37, for Australia 25, for South Africa 7, for New Zealand 6, and for Newfoundland 2.

In other words, if an imperial parliament were to be created all the Dominion representatives on it would number but one-third of those from the Mother Country ; and this body would have power to impose taxation, for purposes of foreign affairs and defence, on the inhabitants of the Dominions. Can anyone maintain for a moment that such a scheme is in any sense within the range of practical politics ? Could any people, conscious of its own nationhood and ardently attached to its own autonomy, be persuaded to hand over to such a body so important a function as that of taxation, even for a limited purpose ?

It is a most curious fact that anyone aware of the strength of Dominion nationalism could ever contemplate the application of the federal principle to the Empire ; and yet there are writers who have not only marked its strength but have regarded it as an evil and advocated Imperial Federation as a means of counteracting it. Thus in the days before the war one of them wrote in reference to Canada : " There is a little too much Canada and not quite enough British Empire in Canadian politics."† " Everything nowadays is to be done on Canadian lines, whatever that may mean. The newborn army is to

* Parl. Papers (Cd. 5745), p. 57.

† Lawson : *Canada and the Empire*, p. 44.

be strictly Canadian. The unborn navy is to be Canadian. All domestic legislation is to be purely and absolutely Canadian."* What better proof could he desire of the strength of Canadian national sentiment and of the impossibility of bringing it within any federal scheme? And yet he went on to inform us that "what the most purblind of imperial ministers and parliaments and even the man in the street should be able to see is that Canada, with all its talk of 'nationhood,' is drifting away from its imperial moorings," and then he proceeded to advise us to forge stronger bonds to restrict Canadian autonomy, and to avoid by a scheme of Imperial Federation the evils which he saw in Dominion nationalism. One wonders what his feelings were on the outbreak of war when the same Canadian nation, at whose self-respecting desire to conduct her own local affairs in her own way he was so sorely troubled, sprang, under the impulse of the same nationhood which he so despised, to take her proper share in the defence of the Empire of which she formed a part, and sent that same Canadian army, of which he was so distrustful, to cover itself with the glory of some of the finest episodes of the war.

The truth is, as the majority of people will not need to be reminded, that Dominion nationalism, far from being a weakness in the Empire, is its greatest strength. The Dominions value the Empire, and that which they value their nationhood impels them to uphold, when need be, to the utmost limits of their power. In the days when responsible government was being granted to the colonies men spoke confidently of the "hivings-off" which were to come in the future, when the colonies one by one would separate themselves from the Mother Country and establish themselves as independent states. Colonies, they said, were like fruits which would ripen and fall from the parent tree. But the colonies have proved to be

* Lawson: *Canada and the Empire*, p. 46.

healthy sons and daughters whose powers and faculties have grown with the exercise which responsible government has afforded them, and who, now that they have arrived at the adult stage, are ready to use their every endeavour in the defence of those principles from which they themselves have derived their strength. Never before was the Empire so strong as it is to-day ; so numerous are the silken ties of sentiment and regard which have been established between the Dominions and the Mother Country that their combined strength has been sufficient to withstand the mighty shock of a world war.

Therein lies the answer to those who would restrict Dominion autonomy by the application of the principle of Imperial Federation. The nationalism which has made the Empire strong would not submit to such a restriction. Nations cannot be fused into one by a statutory enactment ; and it is not by any such attempted fusion that the imperial problem will be solved. " All the empires that we have known in the past and that exist to-day are founded on the idea of assimilation, of trying to force different human material through one mould so as to form one nation. Your whole idea and basis is entirely different. You do not want to standardize the nations of the British Empire. You want to develop them into greater nationhood. These younger communities, the offspring of the Mother Country, or territories like that of my own people, which have been annexed after various vicissitudes of war—all these you want not to mould on any common pattern, but you want them to develop according to the principles of self-government and freedom and liberty. . . . I think that this is the fundamental fact which we have to bear in mind, that the British Empire, or this British Commonwealth of Nations, does not stand for unity, standardization, or denationalization ; but it stands for a fuller, a richer, and more various life among all the nations that compose it. And even nations that have

fought against you, like my own, must feel that they and their interests, their language, their religions, and all their cultural interests are as safe and as secure under the British flag as those of the children of your household and your own blood. It is only in proportion as that is realized that you will fulfil the true mission which you have undertaken."*

§ 6. THE PROBLEM OF INDIA

But if the nationalism of the Dominions presents a barrier to those who would solve the Empire problem by means of a federal scheme, their difficulties are increased a thousandfold when they are faced with the question of the status which India is to have in their proposed imperial system. It is a significant fact that in the representative literature of the federalist movement there is no definite or satisfactory treatment of the Indian problem; and yet that problem cannot be ignored, for the plain fact is that India is undergoing a process of development which entitles her to demand an adequate voice in the councils of the Empire.

In the whole of her long history India knew nothing of peace or settled government until the British power was established there. Her history had been an endless succession of wars, a perpetual recurrence of military conquests, a series of ever-changing tyrannies, in which law had been represented by the will of each temporary military despot. To this divided and unsettled land British rule brought the essential blessings of political unity and the impartial administration of a legal system which rested on definite rules instead of on the evanescent whims of a capricious despot. Nor were those legal rules of

* Extract from a speech made by General Smuts at a banquet given in his honour by members of both Houses of Parliament, May 15, 1917.

alien origin. The early British officials in India "accepted and carried on what they found. Where there was native law they applied it: Musulman law to Musulmans, Hindu law to Hindus, and, in the few cases where they were to be found, Parsi law to Parsis, Jain law to Jains. Thus men of every creed—for it was creed, not race or allegiance, by which men were divided and classified in India—lived each according to his own law. . . . The social fabric was not disturbed, for the land customs and rules of inheritance were respected, and, of course, the minor officers, with whom chiefly the peasantry came in contact, continued to be natives. Thus the villager scarcely felt that he was passing under the dominion of an alien power professing an alien faith. His life flowed on in the same equable course beside the little white mosque or at the edge of the sacred grove. A transfer of power from a Hindu to a Musulman sovereign would have made more difference to him than did the establishment of British rule; and life was more placid than it would have been under either a rajah or a sultan, for the marauding bands which had been the peasant's terror were soon checked by European officers."* Thus matters stood for more than sixty years, and except for the Law of Procedure and the Law of Crimes, in which the native customs were defective, almost the only change was that which was due to the imperceptible influence of contact with the scientific legal ideas of Europe. It was not until the nineteenth century, when Bentham's teaching was at work and the spirit of legal reform was abroad in England, that any important legal changes were introduced into India; and even to-day those portions of the native law which were tolerably complete before the British conquest, and which are interwoven with the native religions—the law relating to marriage, adoption, and family matters, and the law dealing with succession to property—

* Bryce: *Studies in History and Jurisprudence*, vol. i, pp. 116–17.

still remain in substance untouched. The rule has been to supply the defects of the native systems rather than to abrogate them.

Such an achievement alone would be remarkable, but it does not stand alone. In addition to the benefits of a long, unbroken peace and the impartial administration of a legal system based largely on native usages England has given to India the benefits of western learning, so that the members of the large and growing class of educated Indians are able to communicate freely with each other and to share a community of ideas and ideals. The result is that ancient customs and ancient traditions are being leavened, and there is growing up in India a sentiment of national unity and a conception of national aspirations which cannot be ignored. All that is best in native Indian opinion looks to see that country, under the guidance and with the help of Great Britain, make material advances in matters political and economic and ultimately to attain within the Empire that standard of freedom and autonomy which the Dominions enjoy.

The justice of that claim has already been admitted by Great Britain, and the Government of India Act, 1919,* has been passed for the express purpose, as stated in the preamble, of giving effect to "the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the gradual development of self-governing institutions with a view to the progressive realization of responsible government in British India as an integral part of the Empire."

Such an enactment has profound consequences which are pertinent to the present inquiry. Whether India, with her impermeable barriers of caste and her 173 different languages, will go forward along the path which the Dominions have trod,

* 9 and 10 Geo. V, c. 101.

or whether she will, as some have argued, mark out a path which is peculiarly her own, is a problem on which the present writer does not feel competent to express an opinion. Nor is such an opinion essential to the present discussion. What is really material at present is the fact that, since India's claim to self-government has been admitted, a place must necessarily be found for her in any machinery which is devised for conducting the common affairs of the British Empire. We cannot offer self-government with one hand and take it away with the other; that would be not merely a deep injustice but political folly of the most dangerous type.

One thing, however, is certain beyond the possibility of denial: it is humanly impossible to devise for the British Empire a federal constitution in which any adequate place for India could be found. The difficulty of providing the necessary machinery for electing the legislature is alone sufficient to place any such scheme beyond the bounds of practical politics. The British Empire contains, in round figures, some 434,000,000 inhabitants, and of these India alone provides nearly 313,000,000, many of whom are wholly illiterate and quite incapable of exercising the franchise. Obviously an electorate system based on population would be impossible so far as India is concerned; while in the United Kingdom and the Dominions, on the other hand, a system based on population would be the only acceptable method of electing the members of a federal legislature. A satisfactory method of electing Indian members would be well-nigh impossible to devise, and if the difficulty could be successfully surmounted the number of members which India should be entitled to send to the federal parliament would be a source of considerable friction. The estimate of that number which an Australian or a South African would make would differ greatly from the estimate which an educated native Indian would make. There

has been considerable friction for some time between India and the Dominions concerning the virtual prohibition imposed on Indians by Dominion immigration laws ;* and the ill-feeling which has been caused would certainly not render any scheme acceptable to India if her representatives could be outvoted by those of the Dominions, and, on the other hand, the Dominions would equally certainly not acquiesce in a scheme in which India had a larger representation than they themselves.

These facts alone are sufficient to prevent the successful realization of a federal empire ; its lines would be too rigid, its details incapable of adjustment, and its provisions for safeguarding susceptibilities in one direction would offend susceptibilities in another. The British Empire is too variegated to be brought within a federal scheme ; it lacks the possibility of a common nationhood which federalism demands ; and its unity will not be maintained by imposing feats of legislation, but by the development of " reasonable understandings and fair customs " which will enable its component nations to work in partnership, unhampered by the immutable " checks and balances " of a statutory system.

§ 7. FEDERALISM IN HISTORY

No doubt the advocate of the federal solution will have much to say in answer to such a conclusion ; he will appeal to history, to the success of federalism in Canada, in Australia, and in the United States of America ; and he will ask why, if the federal system has proved so workable in those countries, its application to the British Empire should prove disastrous. But the answer is not far to seek ; for there is in truth no parallel between the conditions existing in those countries at the time when their

* Ante, pp. 49–51.

constitutions were created and the conditions existing in the British Empire to-day.

In Canada and in Australia there were, at all events, the elements of a nation, a number of communities of similar race and similar origin, occupying contiguous territories and faced by the very reason of their geographical position with common problems in respect of which a general policy was essential. But in the modern British Empire conditions are wholly different; instead of the elements of one nation there are several developed nations; and instead of a large number of common problems there are, in fact, but few. The concerns of Canada are, and must inevitably be, in many respects different from the concerns of Australia, and the concerns of New Zealand from those of South Africa, and to attempt to apply anything like a common policy to the whole Empire would be little short of disastrous.

And if no parallel can be drawn with the situation in Canada and in Australia at the times when federalism was adopted there, much less can any parallel be drawn with the situation which led to the creation of the constitution of the United States; for, in truth, the constitution adopted by the United States in 1787 was little less than a desperate remedy to meet the needs of a desperate situation.

The end of the American War of Independence left thirteen small contiguous states faced with the necessity for a common policy on many matters, above all, for a common policy of defence, and yet so wrought upon by mutual jealousies as to be unable to evolve an effective scheme in respect of any single matter. Even before the separation from England there had been but little political connection between them. They had their own legislatures, their own laws, their own history, their own traditions; they were united by the sole circumstances that they were all possessions of the British Crown, and neither

in sentiment nor in law did any other ties exiſt between them. Even when they were fighting side by side for their own independence local jealousies sapped their ſtrength. To raise a continental army, to fight for the colonies as a whole, was a matter of the utmoſt difficulty ; the local assemblies even went to the length of offering bounties to those who would enliſt in the militia, and thus by competition took for themselves men whom the recruiting officers were endeavouring to obtain for Washington's army ;* and but for the aſſiſtance of the French it is doubtful if the coloniſts, despite the incompetence of the generals who commanded the British forces, would have gained their independence.

When the war was over the same mutual jealousies deſtroyed almoſt every effort to eſtablish a common policy. The colonies had formed themselves into a confederation, a " firm league of friendship " for offensive and defensive purposes.† Each ſtate retained its sovereignty and independence in all other matters ; and there was no common authority except a Congress in which every ſtate, large or small, had a single vote, and which possessed advisory powers only without any jurisdiction over individual citizens. But Congress proved a failure because of the indifference of the ſtates, an indifference so great that it was often found impossible to procure a quorum for weeks, sometimes for months, after the date fixed for the meetings ; and when a meeting did succeed in coming to an agreement on any queſtion it had the utmoſt difficulty in persuading the ſtates to take the advice it gave.

It was with such machinery that the revolted colonies found themselves faced with a vaſt amount of debt, the accumulated coſt of the independence they had won ; and the mutual

* Marshall : *Life of Washington*, vol. ii, p. 555.

† *See* Macdonald : *Seleƈt Documents Illuſtrative of the Hiſtory of U.S.*, pp. 6–15.

jealousies existing among them rendered that machinery wholly unworkable.* Under such circumstances American affairs moved rapidly towards a crisis which only desperate remedies could allay. Unless the colonies were to resolve themselves into thirteen independent states, a condition of affairs which, owing to their lack of goodwill towards each other, could have been productive of nothing but anarchy, it was essential that some means should be devised whereby unwilling states could be compelled to give up that with which they could not be induced to part by mere persuasion. To avoid anarchy either federalism or tyranny was essential, and federalism was adopted.

Federalism was forced on the Americans by the overwhelming necessities of their case. And once that point be established the fallacy becomes obvious in the arguments of those who would have us believe that federation is the only solution to the empire problem because it was the only remedy open to the Americans. There is no parallel between the two cases. There are no mutual jealousies to-day between the component parts which have placed the Empire in desperate straits. On the contrary, never was the Empire stronger than it is at the present time ; and for anyone who has remarked the unstinted devotion with which the Dominions poured out their blood and their treasure during the war to place their relations to the Mother Country and to each other on the same plane as the mutual relations between the revolted American colonies is surely to allow a political prepossession to get the better of critical judgment.

Equally fallacious, also, is the lesson which the advocates of federalism seek to draw from the legislative union between England and Scotland in 1707. If, they argue, it was possible in that instance to fuse two nations into one by statutory enactment, and to do so with benefit to both, why should it not be

* *See* Marshall : *Life of Washington*, vol. v, p. 36.

possible also to effect a similar fusion of the nations of the British Empire? The argument is one to which Mr. Curtis * attaches considerable importance. He quotes words of Professor Dicey † to the effect that "the Parliaments of England and Scotland did . . . each transfer sovereign power to a new sovereign body," a statement which no sane person will attempt to dispute; and then he asks us to believe that the Union was consummated by "a cut-and-dried plan" such as the opponents of his views refuse to accept. "It was 'cut' in the form of articles discussed and agreed upon by English and Scottish Commissioners appointed for that purpose in 1706, and by them drafted into the form of a Bill, which in 1707 was 'dried' or perpetuated as a legal enactment by the Scottish and English Parliament."

In answer to that, however, it must be asserted, with all due respect to so able a writer as Mr. Curtis, that the union of 1707 was not in any true sense of the term the result of a "cut-and-dried" plan. On the contrary, it was the result of a long process of development, of reconciling old feuds and ancient prejudices, and creating in their stead a sense of common interest. From the time of Edward I onwards union had been the ideal of all ambitious statesmen; and when in 1603 James VI of Scotland succeeded to the English throne its accomplishment became more and more a matter of necessity. It was bad enough that the two countries under different monarchs should be jealous rivals and possible enemies, but it was infinitely worse that, while nominally in allegiance to the same king, they should be severed by mutual distrust and commercial jealousy. Yet it was not until a century had elapsed after the succession of James to the English throne that the truth was sufficiently

* See *The Problem of the Commonwealth*, pp. 228–30; *The Commonwealth of Nations*, pt. i, pp. 622–23.

† *Law of the Constitution*, pp. 66–67.

perceived, the community of interest sufficiently understood, and old feuds sufficiently reconciled for union to come within the bounds of practical politics. And even when union was an accomplished fact it was not in such a form as would have commended itself to philosophers working out in the abstract a perfect system of government for a united Great Britain. The union effected was for legislative and administrative purposes only ; it left absolutely untouched matters of judicature and religion ; and to this day the systems of private law remain, for the most part, distinct in the two countries.

There is surely but little in such an instance to convince one of the possibility of Imperial Federation to-day. Rather would the lesson to be derived from the legislative union of England and Scotland go to support the view that the best constitution for the British Empire will be the result of development, of shaping and moulding existing institutions to meet new needs, of solving in a practical way practical difficulties as they arise.

No doubt there is little in such a method to attract those who talk of "big views" and "comprehensive schemes." But it has its justification in our constitutional history. The British Constitution has not been built by theorists and philosophers. There have been elaborate schemes put forward in every generation for settling constitutional problems in black-and-white, but the British Constitution owes little to any of them. On the contrary, it is the work of practical men whose chief concern has been to carry on the business of the country from day to day, and its evolution in this way has given it the quality which it is most desirable our future Empire Constitution should possess—the quality of practicability. That which has been most efficient and most valuable in the British Constitution has been the result not of breaking with the past nor, on the other hand, of standing by and allowing

matters to drift, but of developing and extending existing institutions to fit new circumstances ; and the interests of the Empire can best be secured not by attempting to fit the various Dominion nationalities into a federal scheme based on a fallible human estimate of the future but by developing and refashioning the existing fabric in a way which will give such fuller scope to Dominion autonomy as the needs of the time demand

Chapter V. *The Organization of a Britannic Partnership*

§ I. THE IMPERIAL CONFERENCE

"I HATE this rage to destroy without building up." So Rousseau is reported to have spoken, and, in truth, one would do but little service to the Empire by attempting to prove the impossibility of the federal solution and then leaving the matter without any attempt to suggest an alternative remedy. Indeed, it has become far too common to suppose that if federalism be not adopted there is nothing left to do but to "let the constitution grow." Such an alternative would be as disastrous as federalism itself, and more than equally unsatisfactory. We cannot, Micawber-like, remain inactive waiting for something to turn up. The greatness of a state does not lie in a policy of drift. It depends on the will and the power to strive with the world's conflicting currents, and the ability of the state to adapt itself by conscious effort to the environment in which it is placed. The answer to the advocate of Imperial Federation is not "Let the constitution grow," but—a far different thing—"Help the constitution to grow." The constitution must be developed; and, to provide a starting-point, there are in existence to-day the rudiments of what, with judicious rearrangement and extension, will produce an organic constitution sufficient to meet the needs of the Empire for several generations to come far better than any artificial scheme of federal government imposed on peoples whose national sentiments reveal too much variety of outlook for the successful working of federal institutions.

The foundations were laid as long ago as 1887. In that year advantage was taken of the fact that colonial representatives were in London for the occasion of Queen Victoria's Jubilee to hold a Colonial Conference at which questions of imperial defence and allied topics were discussed, in many cases with

distinctly important results. In 1894 a similar conference met at Ottawa at the invitation of the Canadian Government, and Lord Jersey attended as the representative of the United Kingdom. Three years later a Colonial Conference met for a second time in London, and the share taken by the colonies in the South African War led to a third meeting in 1902.

Thereafter the conference became a recognized institution, and it was placed on a definite footing at a fourth meeting in 1907, when the following highly important resolution was carried :

"That it will be to the advantage of the Empire if a conference, to be called the Imperial Conference, is to be held every four years, at which questions of common interest may be discussed and considered as between His Majesty's Government and the governments of the self-governing Dominions beyond the seas. The Prime Minister of the United Kingdom will be *ex officio* president, and the Prime Ministers of the self-governing Dominions *ex officio* members of the conference. The Secretary of State for the Colonies will be an *ex officio* member of the conference and will take the chair in the absence of the Prime Minister.

"Such other ministers as the respective governments may appoint will also be members of the conference, it being understood that, except by special permission of the conference, each discussion will be conducted by not more than two representatives from each government, and that each government will have only one vote."*

The first conference thus organized, the first Imperial Conference in the true sense of the term, met in 1911, a subsidiary conference in the meantime having been convened in 1909 to discuss the technical question of imperial copyright ; and the conference of 1911 is worthy of special note because

* Parl. Papers (Cd. 3583).

the Dominion ministers who attended it were invited to a meeting of the Committee of Imperial Defence, at which they listened to an exposition by the Foreign Secretary of the foreign affairs of the Empire.* The step was an important one. The Committee of Imperial Defence, it is true, has no direct share in the decision of questions of policy ; legally it has no existence or functions at all. In its origin it was a small body established informally as the result of a recommendation of the Hartington Commission in 1890 † for the purpose of enabling the Parliamentary heads of the naval and military forces, and their chief professional advisers, to consider the estimates and co-ordinate matters of joint naval and military policy. Under Mr. Balfour, however, it acquired a position of much greater importance ;‡ and although its functions still remain advisory it has become a body in which questions of foreign policy are discussed in their immediate relation to the problems of Empire defence. The admission of Dominion ministers to its deliberations was, therefore, a progressive step of real importance ; and the progress thus made was continued still further when the next Imperial Conference met in 1917.

§ 2. THE IMPERIAL "CABINET"

A conference should have met in 1915, but the British Government thought it inadvisable, owing to the war, that the meeting should take place. The change of government, however, which occurred when Mr. Lloyd George took office brought with it a change of policy in this respect, as in many others, and a meeting of the Imperial Conference was called for March 1917. In the meantime the way had been prepared for a highly important development. When the war had been

* Parl. Papers (Cd. 5745). † Parl. Papers (Cd. 5979).
‡ Parl. Papers (Cd. 1791), p. 550, *et seq.*

in progress for rather more than a year Sir Robert Borden, Prime Minister of Canada, who was then on a visit to England, accepted an invitation from Mr. Asquith to attend a meeting of the Cabinet of the United Kingdom ; and for the first time a Dominion minister attended an ordinary meeting of His Majesty's Cabinet and had an opportunity of communicating in the most effective manner possible his opinion on matters of concern to the Dominion which he represented. The precedent was distinctly important. Eight months later it was followed in the case of Mr. Hughes, Prime Minister of Australia, who attended a meeting of the British Cabinet on March 9, 1916, and in October of the same year the course was adopted in the case of two members of the Government of New Zealand, Mr. Massey and Sir Joseph Ward. Thus by precedent was established the highly important principle that a Dominion Cabinet Minister is eligible for attendance at a Cabinet meeting in the United Kingdom, and once that point was settled the way was open for highly important developments in the machinery for consultation between the British Government and the Dominions.

On December 25, 1916, the Secretary of State for the Colonies sent to the Governments of the Dominions a telegram inviting their respective Prime Ministers, or their nominated substitutes, to a special War Conference of the Empire. "His Majesty's Government," it ran, "invite your Prime Minister to attend a series of special and continuous meetings of the War Cabinet, in order to consider urgent questions affecting the prosecution of the war, the possible conditions on which, in agreement with our Allies, we could assent to its termination, and the problems which will then immediately arise. For the purpose of these meetings your Prime Minister would be a member of the War Cabinet."

The last sentence is deserving of particular attention. The

Dominion ministers were not to be mere expert counsellors to advise on matters concerning the countries which they represented; they were admitted as equals of the members of the British Cabinet, and as equals they could voice the views of the Dominions from which they came.

Nor was the voice of the Dominions alone to be heard along with that of the British ministers. A telegram was also sent by the Secretary of State for India to the Viceroy, stating that India was to be represented in the person of the Secretary of State, who desired to act with the assistance of two gentlemen specially selected for the purpose.

The meeting thus called assembled in March 1917, and held fourteen sittings. "While it was in session its overseas members had access to all the information which was at the disposal of His Majesty's Government, and occupied a status of absolute equality with that of the British War Cabinet. It had prolonged discussions on all the most vital aspects of imperial policy and came to important decisions with regard to them."*

Indeed, so successful was the experiment that the new arrangement would seem to have taken its place as a permanent and important organ in the regulation of the relations between the component parts of the Empire. "The Imperial War Cabinet was unanimous," Mr. Lloyd George has said, "that the new procedure had been of such service not only to all the members, but to the Empire, that it ought not to be allowed to fall into desuetude. Accordingly, at the last session I proposed formally on behalf of the British Government that meetings of an Imperial Cabinet should be held annually, or at any intermediate time when matters of urgent imperial concern require to be settled, and that the Imperial Cabinet should consist of the Prime Minister of the United Kingdom

* Mr. Lloyd George, House of Commons, May 17, 1917

and colleagues as deal especially with imperial affairs, of the Prime Minister of each of the Dominions or some specially accredited alternate possessed of equal authority, and of a representative of the Indian people to be appointed by the Government of India. This proposal met with the cordial approval of the overseas representatives, and we hope that the holding of an annual Imperial Cabinet to discuss foreign affairs and other aspects of imperial policy will become an accepted convention of the British Constitution."

Subsequently, the Government of Australia, which owing to the internal political situation of that country was unable to be represented, signified its hearty agreement with the proposal ; and although the exigencies of the war prevented for a time any further meeting a second conference of the representatives of the Empire has completed its sittings only a few months ago, and the establishment of the new system may be regarded as an accomplished fact. The manner of its establishment is worthy of note. Quietly and unobtrusively it came into existence, not as the result of the application of a grandiose political theory, but as the work of a statesman who saw the needs of the Empire and attempted to meet them in a practical way. But the simplicity of its origin is apt to conceal the great importance of its existence. The Dominion ministers who assembled in 1911 had an opportunity of stating their views before a body which exercises the most important advisory functions in the spheres of foreign affairs and empire defence ; but those who met in 1917 had a greater opportunity still, for they were able to state their views to the body which acts on the advice and makes the decisions. It was a step which carried far forward the process of development towards an empire partnership, and it fully justifies the description which Mr. Lloyd George has bestowed upon it—"a memorable landmark in the constitutional history of the British Empire."

§ 3. "CABINET" OR "CONFERENCE"?

But, important though the new procedure is, there is current a lamentable ambiguity concerning its exact nature. At the time of its introduction it was known generally as a "cabinet"; at the present time some ministers use the same term,* while others prefer the assembly a "conference." The point cannot be dismissed as a mere difference of terminology, for the words "cabinet" and "conference" convey totally different meanings. The adoption of either of them will go a long way towards determining the exact functions which this meeting of Empire Premiers is to exercise, and on those functions there depends the answer to the further question of whether the procedure can be accepted by the overseas peoples and so take its place as a permanent organ for the conduct of the Empire's business.

A Cabinet is an executive body, "a committee of the legislative body selected to be the executive body"†, and the most outstanding of its characteristics is the collective responsibility of its members to the legislature. Its decisions must take the form of unanimous advice tendered to the Crown, and for that advice every minister is responsible to Parliament. The day has gone for ever when a Cabinet Minister could disclaim responsibility for the acts of his colleagues and still retain office. If he dissents from the decisions of his fellow-ministers he has only two courses open to him; he must either resign from the ministry forthwith or he must pocket his scruples and stand as one with his colleagues, accepting responsibility for their acts and incurring risk for opinions which he does not share. There

* Mr. Churchill, for instance, has described the meeting of 1921 as "a meeting of the regular Imperial Cabinet."—Anzac Day Luncheon, April 21, 1921.

† Bagehot: *The English Constitution*, p. 11.

is no other course where a cabinet system is adopted ; and yet it would be impossible to apply any semblance of the doctrine of collective responsibility to the meeting of Empire Premiers to which the name Imperial Cabinet is so loosely given.

Unanimity is possible in the case of a national cabinet because national government nowadays is party government. The Cabinet consists of the leaders of the party which has the majority in the lower house of the legislature, and it must of necessity possess a certain uniformity of outlook on broad matters of principle and policy. But such a condition of affairs is largely absent from an assembly of Dominion Premiers. The mere fact that they are all anxious to promote the welfare of the Empire will not ensure that they will all hold the same views on Empire problems. The difference in geographical situation of their respective countries alone would produce diversity, and when to that is added the fact that it is scarcely likely that the same party would be in power in all the Dominions at the same time the prospects of divergence in views, and even in principles, are considerably increased. The truth is that those who find in the new procedure a possibility of a cabinet truly imperial in its composition have been misled by the peculiar circumstances under which the meeting of 1917 took place. The Empire was then united in the pursuit of a common aim ; national desires and national purposes were subordinated to the one supreme task of defeating the enemy, and there was little room for a divergence of policies to arise. The main purpose was clear, and all that was needed was an interchange of views on how best that purpose might be attained.

Times of peace, however, present issues which are more complex. There is then, as a rule, no one dominating purpose which takes precedence over all others ; and any proposed line of policy must necessarily be seen to affect different parts of the

Empire in different ways, and, in consequence, will give rise to different views concerning its expediency. If a concrete example be required there is one ready to hand. An Imperial Conference has just closed its session, and its discussion of the question of renewing the Anglo-Japanese Alliance contains a moral which ought not to be missed. No adequate official report has yet been presented to the public, but the accepted view of the outlines of the discussion bears so far the stamp of inherent possibility that it will serve the purpose of an illustration of the point at present under consideration. Briefly, the facts seem to have been that the British Government was definitely in favour of the renewal of the treaty; Australia and New Zealand gave a conditional assent to the British view; but General Smuts and, above all, Mr. Meighen were resolute in their opposition. No actual decision was reached on the merits of the case, nor was such a decision needed, because it was discovered that the legal technicalities necessary to a termination of the treaty had been omitted, so that its automatic continuance for another year was legally inevitable. That, however, is not material to the present discussion. The point of moment is that there has been a marked divergence of view among the representatives of different parts of the Empire over an important question of foreign policy, and it is useful to consider what would have been the position if an immediate decision had been essential and the meeting of Premiers had been, in fact, a true Imperial Cabinet. General Smuts and Mr. Meighen would have had only two courses open to them; they could have either resigned or accepted responsibility for the decision of their colleagues with whom they themselves profoundly disagreed. Either course would have had the most disastrous consequences. To have resigned would have been to have left their Dominions unrepresented in a body the very purpose of whose existence is to

give the overseas peoples of the Empire adequate representation when questions which concern them are discussed. To have remained and to have accepted responsibility for the decision of the majority would have been to have pledged their countries to a course which it was certain their peoples would have refused to follow. In the light of such considerations there is a reduction to an absurdity of the view of those who regard the meeting of Empire Premiers as a Cabinet. As a matter of sober fact, everyone knows what would have happened if the discussion on the renewal of the Anglo-Japanese Alliance had been pushed to an immediate decision. General Smuts and Mr. Meighen would have remained at the conference, but they would have made it plain that the Union of South Africa and the Dominion of Canada would shoulder none of the responsibilities which flowed from the renewed agreement, and that if the British Government found it necessary at any time to take action under the treaty then such action must be taken without any active assistance from the dissenting Dominions. If such a view be correct the term "cabinet" is an obvious misnomer. A cabinet implies unanimity, but the true function of the conference of Premiers is that of a meeting in which representatives of various nations of the Empire may, with full knowledge of all material facts, state the views of the nations which they represent and attempt to co-ordinate their policies on those matters concerning which co-ordination is found to be possible.

No other view would be acceptable to the overseas peoples. An Imperial Cabinet would deny to the Dominions the full realization of that nationhood to which the whole history of each of them inevitably tends. Moreover, it is impossible that a cabinet should remain the only organ for the government of the Empire. Cabinet government means responsible government, and an Imperial Cabinet would of necessity imply some

new imperial body which could exercise control over it. The Imperial Cabinet would otherwise tend too much to become an irresponsible body not subject to anything like an adequate degree to the wishes of the peoples whose destinies it was to shape.

Indeed, those who have accepted the view that the new conference of Dominion Premiers is a cabinet have had a difficult task to point to any body to which its responsibility is due. After the meeting of 1917 Sir Robert Borden * said that the Imperial Cabinet was an arrangement whereby "each nation . . . preserves the responsibility of its ministers to its own electorate." If he really did regard the conference as a cabinet, in the true sense of the term, he imagined a constitutional position which could not possibly be maintained in practice ; for a control divided between six electorates would be so ineffective as to merit the description of no control at all.

Even the British Cabinet, which in theory is subject to the control of the House of Commons, has tended for some time more and more to become in practice an irresponsible body. Writing in 1908 an acute American observer was able truthfully to say : "In both (legislation and administration) the English system seems to be approximating more and more to a condition where the Cabinet initiates everything, frames its own policy, submits that policy to a searching criticism in the House, and adopts such suggestions as it deems best ; but where the House, after all this has been done, must accept the acts and proposals of the Government as they stand, or pass a vote of censure and take the chances of a change of ministry or a dissolution."†

Such a condition has been developing for almost half a century, and to-day it has reached an intensity which makes it

* Speech to the Empire Parliamentary Association, April 1917.

† Lowell : *Government of England*, vol. i, p. 327.

obvious to the most superficial student of our institutions. It is due to many causes, but most potent among them all is the fact that in recent years the function of Parliament has been misconceived, and there has been thrown upon the legislature a variety of duties which are far beyond its power to perform. Parliament has too many things to do and insufficient time in which to do them, and one of the results is that nearly all the time of the House of Commons has been placed at the disposal of the Government. No doubt, as a matter of pure theory, it is open to a member of the House to introduce any Bill which he may desire to see pass into law, but the time allotted to private members for such purposes has been so extremely meagre as to deprive them of all practical chances of getting their measures into operation, except on those very rare occasions when they have happened to secure the special approval of the Government. The result has been that in practice the Government has had an almost exclusive power of initiating important legislation and even of framing it in many matters of detail. When a Bill is before the House then, admittedly, members may suggest amendments, but in recent years it has only been on isolated occasions than an amendment which the Government has refused to accept has been carried.

Nor is this control on the part of the Government confined to matters of legislation; it extends also to administrative business. In theory, no doubt, the House may adopt an address or pass a resolution calling upon the Government for any particular course of administrative action which the House may desire; but the rules of procedure leave little room for the discussion of such resolutions, and if, on any recent occasion, such opportunities as were available have been utilized for that purpose it is very rarely that a resolution has been passed against the wishes of the Government. In short, the development has been more and more towards the rule that the House must

adopt in the main the proposals of the Government or pass a vote of censure. A vote of censure, however, necessitates a change of ministry or a dissolution, and neither contingency is one which the House, as a rule, desires to bring about, for the majority of its members usually belongs to the party of which the ministers are the leaders, and the party system nowadays involves an increasingly rigid organization. The result is that, in practice, party leaders govern the country with the general advice and assent of the rank and file of the party.

Nothing could illustrate better than the constitutional events of the war the pre-eminence in the English system of the Government, and, above all, of that part of the Government which constitutes the Cabinet. The Coalition Government which was formed at an early stage increased, rather than diminished, the control of the Cabinet over the Commons, and the formation of the War Cabinet which superseded it carried the process a great deal further. The War Cabinet was formed altogether independently of the Commons, and the House was not consulted at all in the matter. Mr. Asquith's Government was not overthrown by a vote of the Commons ; on the contrary, it could, and to the very end it did, command a majority of the votes of that House, but when the new Government was formed the House transferred its allegiance because there were reasons why the new system should command its support. The new system did not, however, increase the power of the Commons ; it had rather the reverse effect, for its avowed object was to produce a stronger Government, not a stronger House of Commons. The very structure of the new Cabinet bears eloquent testimony to the fact that its establishment did involve a decline of parliamentary control. It was a compact body, small enough to arrive at decisions rapidly and effectively. Its members did not appear in the House of Commons as frequently as had been the previous

practice with Cabinet ministers; they applied themselves in private to framing the policy of the country, and the Prime Minister even appointed a substitute to manage the House for him, and personally took part in its discussions only on occasions of outstanding importance.

The matter is one which is worthy of serious consideration in any discussion of the future government of the Empire. It was not by the addition of Dominion ministers to a normal British Cabinet that the so-called Imperial War Cabinet was formed; the British Cabinet consisted of six, not twenty, members, and although, so far as the domestic business of the United Kingdom is concerned, we have reverted in most respects to the normal, pre-war type of cabinet, it is not with such a body that the Dominion Premiers who come to London consult; they consult with "the Prime Minister of the United Kingdom and such of his colleagues as deal especially with imperial affairs,"* and the full British representation at any meeting consists of some half-dozen ministers.

If such a body is to be regarded as a true Imperial Cabinet exercising definitely executive functions the result will certainly be unacceptable to the peoples of the Empire. We shall be taking from a British Cabinet, already free from adequate control, six or seven ministers who will thus gain further freedom from responsibility, and we shall be constituting them an executive body by the addition of Dominion ministers over whom the British Parliament has no control whatever. Such an arrangement would be not democracy but oligarchy. The Empire, however, contains free peoples; and with an imperial executive an accepted reality we should be faced with the immediate and essential task of devising some new assembly which could exercise an effective control over it and so place it in its proper position as part of a responsible system.

* Ante, p. 119.

We should have to call in the aid of the federalist, whose views we have already dismissed as inapplicable to the Empire of to-day. "Since you have an Imperial Cabinet," he would say, "and since you desire it to be a responsible body, your only course is to establish also an imperial parliament to whose control your cabinet shall be subject." Such an argument cannot be refuted if once the existence of an imperial executive be accepted; and yet the fact stands beyond the faintest possibility of doubt that the attachment of the Dominions to their autonomy is so strong that they could not be brought to consent to the creation of a properly constituted Imperial Parliament, however limited might be the number of topics assigned to it. At the Imperial War Conference of 1917 a resolution was unanimously passed providing for a future special conference to discuss the whole question of the government of the Empire, but it contained the very significant proviso that any plan adopted should preserve "all existing powers of self-government and complete control of domestic affairs, and should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth."* But "a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth" is impossible if once an Imperial Parliament be created, and yet an Imperial Parliament is essential if an imperial executive is to be subject to due control.

Sir Herbert Samuel has suggested † that the difficulty might be surmounted by the establishment of a body fully representative of the various legislatures of the Empire which, without possessing any direct legislative power, should have the right to examine and comment upon the proposals of the Imperial Cabinet and to pass resolutions for their adoption, alteration, or rejection. To such a body the Imperial Cabinet would

* Parl. Papers (Cd. 8566), p. 5.

† *The Nineteenth Century*, March 1917.

submit its proposals, and by it they would be discussed, criticized, and, if need be, amended ; and when discussion, criticism, and amendment had so shaped those proposals as to render them acceptable to the assembly the practice would be for that body to put them into the form of resolutions which it would recommend the various Parliaments represented to carry into effect by legislation.

The scheme is certainly ingenious, but, apart altogether from the almost insurmountable difficulty of assembling so many Dominion representatives in London at the same time, the plan is open to the further objection that it attempts to set up a cumbersome machinery to do a type of work which could be accomplished just as conveniently in a less elaborate way. Its object is to make recommendations for co-ordinating the policies of the various nations of the Empire, and it fully recognizes the right of any Dominion to abstain from carrying out a recommendation with which it disagrees. Precisely the same position can be attained, however, if only the truth be recognized that the so-called Imperial Cabinet is not a cabinet at all, but a conference of Dominion and British ministers. It is simply an outcome of the important fact that what we still call the British Empire has ceased to be an empire, according to the usual meaning of that word, and has become in most essential respects a league of autonomous nations imbued with similar ideals and desirous for many purposes of working in concert with each other ; and the so-called Imperial Cabinet, far from possessing direct executive power, is a periodic meeting at which the representatives of the autonomous nations of the league may meet to discuss common problems and the possibility of concerted action in those matters in which concerted action is found to be desirable

§ 4. CONTINUOUS CONSULTATION

Such a body could exercise a highly important function, and would in all probability be the chief and central organ for the co-ordination of the Empire's affairs. But it is unlikely that it could unaided perform with complete effectiveness the task it had to do. An assembly meeting but once a year could of necessity do little more than agree on general principles of policy; to the Government of the United Kingdom—"the senior partner in this concern"—would fall the duty of applying those general principles to concrete instances which might arise after the conference had dispersed. But the application of a general principle to a concrete set of facts is often a difficult problem to which more solutions than one are possible, and it might easily happen that the British Government, acting without the possibility of immediate consultation with Dominion representatives, might adopt one solution when some, or all, of the overseas peoples of the Empire might desire another. Such a contingency might be productive of dangerous friction, and in order to avoid as far as possible a situation so fraught with risk it will be necessary sooner or later to supplement the annual conference of Premiers by some machinery for continuous consultation between British ministers and representatives of Dominion Governments.

One thing is certain. The difficulty cannot be removed by any suggestion for keeping the conference permanently in session; for the main duty of a Dominion minister lies in the Dominion which he represents, and, even though his people were willing that he should remain absent for the greater part of each year, it certainly would not be advisable that he should do so and thereby lose intimate touch with public opinion in his own country. The utmost that can be expected is that the Premiers of the Empire should assemble annually in London

for the discussion of broad principles of policy, and that when the conference has broken up the place of each Dominion Prime Minister should be taken by some duly accredited representative who should guard the interests of his Dominion until the next annual meeting or until the occurrence in the intervening period of some problem of extraordinary urgency should bring the Dominion Premiers again to England.

The proposal that the Dominions should appoint ministers resident in London is not a new one. A suggestion was made in 1912, in a dispatch to Mr. Harcourt,* that representatives of the Dominions should attend meetings of the Committee of Imperial Defence when questions affecting their interests were under discussion. The weight of opinion at the time was that conditions were not quite ripe for such a departure, though the principle itself would appear to have been accepted. The rapid development of the Dominions in constitutional status, however, during and since the war has produced full justification for such a course ; and the appointment of Dominion ministers to reside in this country—and when necessary to attend not merely meetings of the Committee of Imperial Defence, but meetings of the British Cabinet as well—would serve a very useful purpose in keeping the various Governments of the Empire in close touch with each other during the periods which elapse between the annual meetings of the Dominion Premiers in London.

It has been suggested on several occasions that the functions of resident ministers might be performed by the High Commissioners or Agents-General already in England. There are, however, grave objections to such a proposal.† The Agents-General and High Commissioners are members of the Civil Service of the Dominions which they represent, and their

* Parl. Papers (Cd. 6560).

† *See* Keith : *Imperial Unity and the Dominions*, pp. 541–42.

tenure of office is fixed by statute at definite periods which cannot, as a rule, be curtailed by any government. On the other hand, they are men of definite political opinion, for the practice is to appoint to such positions those who have held high political office in the Dominions concerned. Thus it might easily occur that a Dominion Government found itself represented in London by a political opponent and yet might be powerless to effect his removal. It is not by means of such a system that the Governments of the Empire could confer with success ; but if only the practice could be initiated of including in each successive Dominion Government a minister to represent it in England and to confer with the British Government, the machinery for co-operation, of which the annual conference of Premiers forms the central part, would be almost complete.

No doubt the ardent advocate of federalism will see defects arising from the fact that the system here outlined could function only for purposes of consultation and would give no power in the last resort to compel, by so much force as might be necessary for the purpose, the carrying into effect of any recommendations which might be made. In answer to that, however, it is sufficient to say that so long as the peoples of the Empire are actuated by mutual respect and goodwill in their dealings with each other there will be little difficulty in persuading them to follow the course which leads to successful co-operation ; and if, on the other hand, those qualities of respect and goodwill are wanting, no form of government, be it federalism or be it any other type of constitutional system, will serve to govern the British Empire. "Each part of the Empire," Mr. Massey has said, "must find its own way,"* and, indeed, it is a condition precedent to the successful work of any Empire Constitution that the right of each part of the Empire to find

* Parl. Papers (Cd. 8566), p. 44.

its own way should be most fully and freely recognized. The recalcitrant individual may be brought to obedience by the force of the law, but, after all, the law has its limitations. It cannot coerce a young and vigorous nation, and the Dominions, luckily, are too ardently attached to their autonomy to be willing voluntarily to submit to the dictates of any external authority. That does not mean that they are not also attached to the Empire ; on the contrary, they have proved beyond all doubt that they hold it in high regard, and so long as the demands of the Empire do not conflict with the principle of autonomy there need be no doubt that those demands will be met lavishly and ungrudgingly.

§ 5. EMPIRE DEFENCE

The point is one on which too much emphasis cannot be placed, for among those gallant gentlemen who write of the affairs of empire from a strategical point of view there are still many, even among those who have given up hope of the federal solution, who cling to the desire that the local naval and military forces of the Dominions may be placed, even in time of peace, under a single control. Such pious aspirations, however, cannot possibly be realized, for they offend against the great fundamental principle the non-observance of which will render co-operation between the nations of the Empire wholly impossible, the principle that co-operation "should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth."

So far as the land forces are concerned there is the emphatic declaration of Sir Joseph Ward to convince those who still hanker after "unity of control." "I do not believe it possible in practice," he has said,* "for any of these overseas countries

* Parl. Papers (Cd. 8566), p. 52.

to give away the power of controlling their land forces to any Empire Council or any Empire Parliament or any Imperial War Cabinet, even with representatives upon that War Cabinet from every part of the British Empire. That must rest entirely with the local Government both in Britain and in each of the overseas Dominions. . . . If there was a proposal carried at a succeeding conference to include local land defence, and to put the power of framing a concrete army for Empire purposes under an Empire Parliament, I personally would strongly oppose it in our country, and would do everything in my power to prevent it coming into operation, because I believe it would be a very undesirable thing to do." And if these are the words of Sir Joseph Ward, a man who more than any other Dominion statesman is in favour of a strong central authority for the conduct of the Empire's affairs, it is obvious that unity of control for the military forces of the Empire is well beyond the bounds of possibility.

Nor does the question of the local naval forces stand on a fundamentally different basis. Admittedly the defence of the Empire depends primarily on naval strength, and to that extent the case for "unity of control" is stronger in naval than in military matters. Nevertheless, the fact remains that for any Dominion to hand over to an external body, even though the Dominion itself should have representatives thereon, the control of its naval forces would be to deprive itself of a portion of its powers of self-government, and to run counter to the very cause which has produced the need for constitutional reorganization in the Empire.

Nor is such a step essential to efficient Empire defence. The conference of Premiers could frame in private its policy of defence, it could distribute the necessary contributions thereto among the various nations of the Empire, and the Dominion Prime Ministers could persuade their legislatures to pass such

enactments as might be required for the purpose of keeping their local forces up to the required strength. Thus assured of the co-operation of those forces should the Empire unfortunately be involved in war, the naval and military authorities could lay their plans of defence with full knowledge of the strength at their disposal ; and if legislation could be passed providing that on the outbreak of war the Dominion navies should automatically pass for the period of hostilities under the control of the Admiralty there would then be an organization, quite as efficient as any federal system could give us, for defending the Empire according to those strategical principles which naval and military writers tell us are best suited to our situation.

§ 6. THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

In yet another direction there is room for constitutional development ; and along with the establishment of the conference of Premiers and the appointment of Dominion ministers resident in London there might well go such a reconstruction of the Judicial Committee of the Privy Council as would render that body an efficient and useful court of appeal for the Empire. In its present shape the Committee cannot long remain ; for, in truth, the position which it occupies in the judicial machinery of the Empire is the result of historical accident rather than conscious design.

To go back to an early period of our legal history it is sufficient to notice that the Council was that fissiparous body from which the Common Law courts detached themselves in the period immediately following the Norman Conquest. But even after the establishment of those courts a certain amount of residuary royal justice, both original and appellate, remained

vested in the Council, and one of the duties which it took upon itself was to interfere upon occasion to prevent a grave miscarriage or failure of justice, particularly in cases where the offender was so powerful as to render the ordinary methods of procedure inconvenient or inadequate, or where the faulty procedure of the Common Law courts made an efficient trial inadequate. It was out of its jurisdiction in such matters that interesting developments arose. It would appear that for some time the criminal jurisdiction of the Council was exercised by a small committee, and Henry VII, whose chief task was to remove, by the stern enforcement of justice against powerful offenders, the anarchy which the War of the Roses had left, procured the passing of the famous Star Chamber Act,* the effect of which was to remodel the Committee and establish it as a regular court for the trial of certain classes of offenders. For a time the court was popular, for it dealt with offences † with regard to which the ordinary courts were liable to intimidation ; but under the Stuarts it became an instrument of the royal despotism, and, largely on account of its misuse against the political opponents of the monarch, the Council was deprived of much of its jurisdiction.

The Star Chamber was abolished by the Long Parliament in 1641,‡ and the Act by which this was done provided that neither the King nor his Council should have any jurisdiction outside the ordinary courts of justice. The Act, however, only referred to England, and thus left untouched the right of a suitor in the foreign dependencies of the Crown to petition the King in Council for justice. As the Empire grew the number of appeals to the Privy Council grew also, until in 1833 it became necessary, in order to deal more efficiently with them, to

* 3 Henry VII, c. 1.

† *e.g.* Perjury, forgery, maintenance, riot, fraud, libel, conspiracy, etc.

‡ 16 Car. I, c. 10.

establish the Judicial Committee of the Privy Council, a body which at the present time consists of the Lord President of the Council, the Lord Chancellor, such members of the Privy Council as hold or have held high judicial office, and the six Lords of Appeal in Ordinary. Former chief justices or judges of the superior courts in various colonies, being members of the Privy Council, may also be members of the Judicial Committee, but their number must not exceed seven, and not more than two former chief justices or judges of any High Court in British India, being members of the Privy Council, may be members of the Judicial Committee if the Crown so directs.

Viewed simply from the point of view of its composition the court seems strong enough, but viewed in relation to the work it has to do it appears in another light. Never had any court a more amazingly variegated jurisdiction. "This great tribunal . . . administers almost every system of law known to mankind. Turn over the volumes of the *Law Reports* and you will find it one day discussing a decree of the Lateran Council of the thirteenth century as to prohibited degrees of marriage under the Canon Law in a case from Quebec; another, and it may be weighing a response from Papinian or the commentaries of Grotius and Voet on the Pandects, in an appeal from South Africa; yet another, and you will find it deliberating whether a devise ostensibly in favour of an idol—it may be a non-existing idol—is an attempt to evade the Hindu rule forbidding gifts to an unborn person; or, again, it might be discussing an agreement in restraint of trade in Australia and the pedigree of Coke's views about monopolies and the Common Law."* It would be possible to multiply instances both in civil and in criminal matters, for in the work of the Judicial Committee of the Privy Council there is mirrored that diversity

* Professor J. H. Morgan, in the *Law Quarterly Review*, October 1914.

which is so prominent a characteristic of the British Empire. Not only do English Law and those legal systems which the Dominions have developed out of English Law come before it for review, but Mohammedan Law, Hindu Law, French Law, Roman-Dutch Law, and various developments of those systems, all occupy important pages in its reports.

This diversity in its jurisdiction, however, though from one point of view imposing, gives to the Judicial Committee, in the opinion of most Dominion lawyers, a serious defect. The statute-law of each of the Dominions is developing distinct characteristics of its own and is diverging to an increasing extent from the legal system of the Mother Country; and the Judicial Committee remains to a large extent not an Imperial Court (for the provisions for the inclusion of colonial judges have been utilized but little in practice), but an English court—a body composed mainly of English lawyers devoting themselves to the trial of Colonial and Dominion appeals. The position is decidedly anomalous. However great may be the legal talent of the members of the Committee—and even the most adverse critics must admit that its personnel includes some of the best judicial talent that the Empire has produced—it is nevertheless obvious that a court composed mainly of lawyers trained in England cannot for ever deal efficiently with the growing complexities and characteristics of Dominion legislation.

It requires but slight acquaintance with the application of legal rules to enable one to appreciate the extent to which extraneous matters, particularly local customs, enter into the judicial interpretation of statute-law; and a body of English lawyers can hardly be expected to understand and appreciate unaided the full significance of such matters in their relation to Dominion legislation. In the majority of cases they cannot be perfectly familiar even with the legislation itself; much less can they appreciate fully the circumstances which the

legislation is designed to govern. They must have the assistance of counsel from the Dominion from which a case happens to come. To send counsel and evidence to London entails considerable expense on a litigant, and yet, unless he is prepared to run the risk of an inadequate trial of his case, the course is one which it is desirable, if not essential, for him to adopt. Sooner or later such a position must become distasteful to the Dominions ; indeed, to some sections of Dominion legal opinion it is distasteful already. "We believe," said an Australian legal practitioner in conversation with the writer, "that we can do the work as well ourselves" ; and it would be difficult to deny the truth of that assertion. If the Judicial Committee of the Privy Council is to be retained at all considerable alterations will have to be made in its form and composition. Some scheme must be devised whereby Dominion appeals can be tried by a court on which the Dominions themselves have adequate representation ; and of the several proposals put forward for that purpose there is probably none which possesses that desirable quality of practicability to a greater extent than a scheme outlined by Lord Haldane in 1912.

Presiding at a Rhodes lecture in 1912 Lord Haldane made a speech on the subject of the Judicial Committee of the Privy Council. He had been struck, he said, by the fact that while the Dominions set a high value on an appeal to the King in Council, they nevertheless desired to have final appeals tried within their own territorial limits ; and he suggested that the true line of future development would lie in the direction of an amalgamation of the House of Lords, as a court of appeal, with the Judicial Committee of the Privy Council. There would thus come into existence a supreme court of appeal for the Empire, and to it would lie appeals from both the United Kingdom and the overseas Dominions. Provision should be made for the sitting of the court in more divisions than

one * and in more parts of the Empire than one. For Canadian appeals it should be possible to send members of the court to Canada, and so on ; and on such occasions it should be possible to invoke the assistance of Dominion judges.

As Professor Keith has remarked,† the proposal has not received the attention which its importance merits. There are obvious advantages in such a scheme, for not only would it enable the Judicial Committee to obtain the assistance of the best Dominion counsel and of the best evidence concerning local conditions at a less prohibitive cost than has hitherto been the case, but it would make it possible also for Dominion appeals to be heard by a court which was uninfluenced by prevailing local prejudices and yet, owing to the inclusion of local judges, fully instructed on matters of Dominion Law. It is only by the adoption of some scheme of this kind that it will be possible to retain the Judicial Committee as a permanent court of appeal for the Empire ; and such an appellate tribunal is essential if there is to be effective co-operation in empire affairs. The history of the Empire has shown that it is impossible to draw a line between matters of common, and matters of purely local, concern ; the two must inevitably overlap, and co-operation between the nations of the Empire, though only for the limited purpose of foreign affairs and defence, will demand uniformity of law on topics (such, for instance, as nationality and naturalization) which experience has shown to have a very intimate connection with foreign affairs.

That uniformity, however, cannot be attained merely by the

* The Judicial Committee of the Privy Council may, at the present time, subject to the approval of the Lord Chancellor and the Lord President of the Council, sit in more than one division at the same time, and the constitutions of the divisions and the holding of divisional sittings may be provided for by Order in Council : 5 and 6 Geo. V, c. 92.

† *Imperial Unity and the Dominions*, p. 386.

legislatures of the Empire passing similar or identical statutes on given topics. When once a statute has been passed it becomes the subject of judicial interpretation ; and although in theory the object of judicial interpretation is merely to expound and apply the law as it stands, yet in practice it inevitably results in the development of the legal system and in the evolution of new elements.* Such a process is inevitable. A judge cannot, of course, overrule the law ; on the contrary, he is bound to give effect to it, but in doing so he must, however explicit the words of a statute may be, interpret them and decide whether or not they are applicable to the facts of the case before him. In the process of interpretation he cannot remain uninfluenced by the spirit of his race and time ; and by that spirit he is unconsciously compelled, however much he may try to avoid all change, to infuse new elements into the legal system. Society is never stationary ; new facts, new combinations of facts, and new relationships are continually being evolved, and in the application of existing legal rules to these new sets of circumstances there takes place inevitably a corresponding development in the legal system itself. If any reader feel disposed to doubt the truth of this assertion let him turn to the Statutes of the Realm and read the words of some such provision as Section 4 of the Statute of Frauds,† and, having done so, let him take up some standard text-book where the statutory provision he has read and the judgments which have been pronounced upon its terms are brought together. He will then see the result of the gradual, unconscious development of the legal system in the process of judicial interpretation.

It is this development which, if co-operation between the

* *See* Jethro Brown : *Austinian Theory of Law*, p. 296, *et seq.* Salmond : *Jurisprudence*, p. 162. Holland : *Jurisprudence*, p. 65, *et seq.* Vinogradoff : *Common Sense in Law*, p. 121, *et seq.*

† 29 Car. II, c. 3.

nations of the Empire is to be more than a mere name, must be supervised in those matters concerning which uniformity has been agreed upon by a common court of appeal; for if the United Kingdom and the Dominions were each to pass identical statutes on any given topic and then to leave the interpretation of them exclusively in the hands of local judges, the uniformity which had been established at the outset would have been seriously impaired, in the course of a few generations, by the imperceptible growth of divergent elements.

* * * * * *

A conference of Premiers, provision for the appointment of resident Dominion ministers, and a court of appeal for the Empire, each more or less in the form in which it has been outlined in these pages, are the needs of the British Empire to-day. Together they will give a workable organization free from the defects which would attend the application of any federal scheme, an organization which would involve neither an interference with Dominion autonomy nor a rigidity opposed to future development, but which, on the other hand, could move with the changing circumstances of the times, could expand and develop with the needs of the Empire and in response to such demands as might from time to time be made upon it, could "grow," as the best of our political institutions have "grown," under the guidance of practical men dealing with the affairs of Empire in a practical way, unhampered by those constitutional "safeguards" the existence of which, in a strongly developed form, has been shown by the history of so many foreign constitutions to be dangerous. Federalism is doubtless an attractive principle; at least, it has been made to appear so in the writings of some who have advocated its application to the British Empire; but in its attractiveness lies a great danger. No constitution can survive the slightest shock unless

its foundations are firmly laid in the sentiments of those it is to govern ; and, if one thing is certain, it is that the prevalent sentiment among the Dominions is altogether incompatible with any federal system. The task before the Empire to-day is not that of devising an elaborate statutory system and seeking to impose it on peoples by no means prepared to work it, but the higher task of evolving on the lines already indicated an Empire constitution like the British—"broad-based upon a people's will."

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